CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 427.

THE HIGHLAND AVENUE AND BELT RAILROAD COMPANY, APPELLANT,

vs.

COLUMBIAN EQUIPMENT COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JULY 29, 1897.

(16,640.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 2, 1897.

1 United States Circuit Court of Appeals, Fifth Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable E. D. White, circuit justice; Honorable A. P. McCormick, circuit judge for the fifth judicial circuit, and Honorable William T. Newman, United States district judge for the northern district of Georgia.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Appellant,
v.
COLUMBIAN EQUIPMENT COMPANY, Appellee. } No. 595.

Appealed from the circuit court of the United States, northern district of Alabama, southern division.

2 This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Alabama, southern division.

Whereupon, the court desiring the instruction of the honorable the Supreme Court of the United States for the proper decision of the question herein arising—

It is ordered that the following statement and question of law be certified to the honorable the Supreme Court of the United States:

On June 1, 1896, the Columbian Equipment Company, averring itself to be duly incorporated under the laws of the State of West Virginia and a citizen thereof, filed its bill of complaint against the Highland Avenue and Belt Railroad Company, a corporation organized and existing under the laws of the State of Alabama
3 and residing in the county of Jefferson, in said State, and a citizen thereof; which bill of complaint was as follows:

4 *Original Bill.*

In the United States Circuit Court for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant,
vs.
HIGHLAND AVENUE & BELT RAILROAD CO., Defendant.

The Columbian Equipment Company, which avers itself to be a corporation duly created and chartered under the laws of the State of West Virginia, and a citizen thereof, brings this, its bill of complaint against The Highland Avenue and Belt Railroad Company, a corporation organized and existing under the laws of the State of Alabama, and doing business and residing in the county of Jeffer-

son, of said State, and a citizen thereof in said county and within said district.

Humbly complaining, your orator, The Columbian Equipment Company, respectfully shows unto your honor:

1. That it is a corporation created and chartered under the laws of the State of West Virginia, and a citizen thereof, but has
5 its principal place of business in the city of New York, State of New York; that the defendant, The Highland Avenue and Belt Railroad Company, was created by an act of the General Assembly of Alabama, entitled, "An act to incorporate the Highland Avenue and Belt Railroad and Improvement Company," approved February, 1887, as will more fully appear by reference to the acts of the General Assembly of Alabama, 1886–1887, pages — to —, which said act your orator begs leave to refer to whenever it may so desire; that, in accordance with the powers conferred in section 1 of said act, the stockholders of the defendant, after its organization, adopted the corporate name of "Highland Avenue and Belt Railroad Company," and it has since continued to use such name.

2. That on and before the 31st day of December, 1894, the defendant was engaged in operating a belt railroad and dummy line in and through the city of Birmingham, Alabama, and in said county of Jefferson, and on said date entered into an agreement in writing with your orator for the sale of all of its properties, which said agreement is in words and figures as follows, to wit:

STATE OF ALABAMA, }
Jefferson County. }

An agreement entered into this, the 31st day of December, 1894, by and between the Highland Avenue and Belt Railroad Company, a corporation created and organized under the laws of Alabama, hereinafter termed the railroad company, party of the first part, and the Columbian Equipment Company, a corporation created and organized under the laws of West Virginia, hereinafter designated the equipment company, party of the second part:

Whereas, the parties of the first part have entered into a preliminary agreement in respect to the matters herein provided and contracted for, as appears by the records and proceedings of the said two corporations;

And, whereas, by a resolution of the board of directors of the railroad company, held on the 30th day of November, 1894, the terms of this contract were agreed upon, and Henry M. Caldwell was authorized on behalf of the railroad company to execute the same;

6 And whereas, the said parties hereto are each respectively expressly authorized by their respective charters to enter into this contract. Now, this agreement witnesseth:

1. The railroad company does hereby lease and let to the equipment company all of its railroad, with all of the rolling stock, engines, tools, machines, equipments, supplies and materials of all kinds now used or to be used in connection therewith and also all real estate,

personal property, franchises, rights of way and privileges for the period of eighteen (18) calendar months from the first day of December, 1894, at and for the rental of five (85) dollars per annum, and the proportionate part of said sum for any less time than one year; the said rental to be payable on the termination of said lease.

2. The railroad company covenants and agrees that it will procure at its own cost and expense, for the benefit of said equipment company, within two (2) months from the first day of December, 1894, the right of way necessary for a railroad track to connect the line of the Birmingham and Gate City street railroad with the track of the Highland Avenue and Belt railroad, at or near the gin factory on Tenth avenue.

3. Said railroad company further agrees that said equipment company shall have the right and option at any time during the continuance of said lease, to purchase all the said railroad, real estate, property, franchises, privileges and rights of way of said railroad company for the sum of three hundred and fifty thousand ($350,000.00) dollars, upon the following conditions and terms: For said option and privilege the said equipment company shall pay to the said railroad company the sum of thirty-five thousand ($35,000.00) dollars, as follows: Twenty thousand ($20,000.00) dollars on or before the first day of January, 1895, at which time the railroad company will deliver the possession of all of said railroad, real estate, property, franchises, privileges and rights of way to said equipment company, and fifteen thousand ($15,000.00) dollars on or before the fifteenth day of February, 1895; in the event of a failure to pay said fifteen thousand ($15,000.00) dollars by the fifteenth day of February, 1895, said privilege and option shall on that day cease and determine, and the twenty thousand ($20,000.00) dollars previously paid shall be thereby forfeited and the possession of the property shall be forthwith restored to the railroad company. In case the said equipment company shall exercise its right and option to make said purchase within the time above specified, to wit, during the continuance of this lease, said sum of thirty-five thousand ($35,000.00) dollars so paid as aforesaid, shall be considered and treated as a part of the purchase price, and the residue, to wit: three hundred and fifteen thousand dollars ($315,000.00) *dollars*, shall be paid with interest at the rate of five (5) per centum per annum, from the first day of January, 1895, to the time of payment.

7

4. The said railroad company hereby agrees to have prepared and duly executed to said equipment company within thirty (30) days after the payment of said sum of fifteen thousand ($15,000.00) dollars as hereinabove provided, good and sufficient deed or deeds of conveyance and transfer of all of said railroad, real estate, property, franchises and right of way and to deposit said deed of deeds and transfers with the Central Trust Company of the City of New York in escrow to be delivered to said equipment company whenever within the period of said option, to wit, on or before the first day of June, 1896, said sum of three hundred and fifteen thousand ($315,000.00) dollars with the interest thereon at five (5) per centum per annum from the first day of January, 1895, shall have been de-

posited in said Central Trust Company to the credit and subject to the check of the railroad company, less any amounts which the equipment company may, in the meantime, have seen fit to pay or to advance to said railroad company. Said railroad company further covenants and agrees that it will make said conveyance and transfer of said railroad, real estate, property, franchises and right of way, free and unencumbered of all liability, and will pay off and discharge all liens, taxes or judgments which now exist or which may hereafter be obtained upon the liabilities of the railroad existing on the first day of December, 1894.

5. Said railroad company agrees that it will apply a portion of said thirty-five thousand ($35,000.00) dollars to the satisfaction
8 in part, of the judgments now existing as a lien on said property. It further agrees that it will protect the said equipment company in the operation of said property from the judgments already recovered against it or which may hereafter be recovered on liabilities existing as aforesaid, so that the same shall not interfere with the operation of said property by the said equipment company.

6. In the event the said equipment company fails within the period of said option and privilege, to wit, on or before the first day of June, 1896, to pay said sum of three hundred and fifteen thousand ($315,000.00) dollars, with interest, as aforesaid, less such sum to which it may be entitled as credits thereon, if any, said option and privilege to purchase shall thereupon and thereby, and without further notice, absolutely cease and determine, and the said equipment company will restore to said railroad company the possession of the said railroad, real estate, property, franchises and right of way, free and discharged of any lien, interest, claim or demand done or suffered by said equipment company, except the taxes for the year 1895; and the said Central Trust Company shall in that event return to the said railroad company the deeds, conveyances, transfers and agreements which may be deposited in escrow with it without the payment of any commission or other charge whatsoever upon the same.

7. Said equipment company covenants and agrees on its part that it will pay said sum of thirty-five thousand ($35,000.00) dollars as herein provided. That during the term of said lease, and within six (6) months from the first day of January, 1895, it will make or cause to be made improvements and betterments on the property and equipments of said railroad company, at an expenditure of not less than ten thousand ($10,000.00) dollars. The said equipment company also agrees that it will pay the taxes on said property for the current year, and the amount so paid for taxes, with interest at five (5) per centum per annum, shall be regarded and treated as a credit on said sum of three hundred and fifteen thousand ($315,000.00) dollars, to be paid in the event it shall exercise the option herein provided; and the said equipment company further agrees that it will advance and pay such additional sum as may be neces-
9 sary to pay said judgments recovered and to be recovered as aforesaid, in the event the said railroad company cannot postpone the payment of the same until after the time when the

said equipment company shall exercise its said option; said agreement being subject to the agreement on the part of the railroad company to protect the said equipment company against interference in the operation of said property by said judgments.

In witness whereof the Highland Avenue and Belt Railroad Company authorizes this contract to be executed by Henry M. Caldwell, one of its directors, and its corporate seal to be hereto attached this, the day and date first above written.

Executed in duplicate.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY,
Per H. M. CALDWELL,
[SEAL.] *Director, with Full Power to Act.*

The Columbian Equipment Company hereby accepts the foregoing lease and contract, and in witness thereof has caused the same to be executed by its president and secretary, and its corporate seal to be hereto affixed, in duplicate, the day and date as aforesaid.

THE COLUMBIAN EQUIPMENT COMPANY.
WAYLAND TRASK, *President.*
[SEAL.] CLARENCE E. STUMP, *Secretary.*

3. That shortly after the first day of December, 1894, your orator took possession of said Belt railroad, dummy line and other properties of the defendant, holding and operating them continuously to the present time.

That in pursuance of the terms of the foregoing agreement your orator has paid the sum of $35,000.00 in cash to the defendant, and in addition thereto has expended on improvements and betterments on the properties and equipment belonging to the defendant to the extent of, to wit: $27,108.56, said expenditures being apportioned as follows:

Rolling stock	$15,947	09
Lakeview park	2,341	15
10 Twenty-second Street bridge	1,070	67
Roadway	6,915	26
Buildings, fences	699	74
Office fixtures	134	65

as shown by orator's books and accounts in Birmingham, Alabama, in excess of the moneys received by your orator from the operation of defendant's property during the term of the foregoing agreement.

Orator avers that the defendant not until the first week in May, 1896, deposited with the Central Trust Company of the City of New York, an instrument in writing in escrow, purporting to be a deed of conveyance and transfer of the railroads, real estate, property, franchises and rights of way of the defendant to your orator, a copy of which said instrument in writing is hereto attached marked "Exhibit A," and prayed to be considered as a part of this bill of complaint.

4. That prior to the execution of said agreement in writing of date December 31st, 1894, Wayland Trask, the president of your orator, came to Birmingham, Ala., from New York, and was by the defendant shown its properties, railroads and rights of way, and your orator avers that the defendant at that time represented to it that the title to its properties was free and clear of all encumbrances, except as to judgments then of record, a list of which judgments is hereto attached marked "Exhibit B" and prayed to be considered as a part of this bill of complaint.

Your orator avers that prior to said agreement of date December 31st, 1894, the defendant represented to it that it was the owner in fee-simple of the strips of land on which its Belt railroad and dummy line were located in and through the said city of Birmingham, Alabama; that it acquired the same from the Elyton Land Company, a body corporate under the laws of the State of Alabama, which had reserved such strips of land for railroad purposes for its own use, when it mapped and platted the property which covered the site of the present city of Birmingham, Alabama, and suburbs; that at said time, the defendant represented to them that the dedication of the streets and avenues of the said city of Birmingham, Alabama, by the said Elyton Land Company, upon which its said rail-
11 roads were located, was made subject to the reservation of said strips of land in the centre thereof for railroad purposes, as aforesaid, and that on account of such reservations, its said Belt railroad was peculiarly valuable as a terminal road for any railroad that might enter the city of Birmingham.

5. That some time prior to the year 1884, the Elyton Land Company, a corporation created and organized under the laws of the State of Alabama, was the owner of a large tract of land which covered the site of the present city of Birmingham and suburbs; that prior to the year 1884 the said land company laid out that part of its lands which lies in section 6, township 18, range 2 west; section 31, township 17, range 2 west; section 36, township 17, range 3 west, and section 1, township 18, range 3 west, of the Huntsville meridian, as is shown on the map hereto attached marked "Exhibit C," and prayed to be considered as a part of this bill of complaint.

6. Your orator avers that a portion of said Belt railroad and dummy line was constructed in and through the city of Birmingham by consent of the municipal authorities thereof, to wit: From Nineteenth street, along First avenue to Twenty-second street, thence along Twenty-second street to Fifth avenue south, from Twenty-seventh street along Fifth avenue southwestward to Thirteenth street, along Fifteenth street from Fifth avenue south to Eighth avenue south, from Fifth avenue south along Fourteenth street to and across Avenue A, and upon and along Avenue B from Fourteenth street westward to the then city limits, which said city limits, at the time of the construction of said part of railroad, is shown by the square of red line on said map marked "Exhibit C." The locations of said parts of railroads constructed within said city limits are likewise shown on said map.

Orator avers that the defendant has no title in fee to said portions

of tracks so constructed within said city limits along, over and upon said streets and avenues, but has only an easement for the operation of its railroad, which is under the control and jurisdiction of the municipal authorities of the said city of Birmingham.

7. Orator avers that prior to the execution of said agreement between your orator and the defendant, it represented to
12 your orator that it was the owner in fee of a railroad track and right of way from a point opposite the east line of Boland's property in block 435, according to said map of Birmingham, westward along the tracks of the South and North Alabama railroad to a point between Twenty-fourth and Twenty-fifth streets, and to a connection with a strip of land called the "neutral strip," which said neutral strip the defendant represented to your orator was a strip of land dedicated by the Elyton Land Company to railroads entering the city of Birmingham: that over and on said neutral strip the defendant had a right of way passing through the city of Birmingham from Twenty-fourth to Fourteenth streets therein, and into and through the Union depot in said city.

Orator avers and charges that the defendant has its track laid along the edge of the right of way of the South and North Alabama railroad between said points, which orator is informed was placed there by a permit or license of the South and North Alabama railroad, but orator avers and states it to be a fact, that said South and North Alabama railroad is now contesting the right of the defendant to said track, denying that it has any title thereto; that the track between said points is now in litigation under and by virtue of a bill filed in the chancery court of Jefferson county, wherein The Highland Avenue and Belt Railroad Company is complainant and The South and North Alabama Railroad is defendant, which said suit is presently pending in the supreme court of Alabama. The said disputed right of way is marked by a red line between the points "U" and "T" on a map hereto attached, marked "Exhibit D," and prayed to be considered as a part of this bill of complaint.

Your orator further avers that the deed deposited by the defendant with the said Central Trust Company in escrow makes no conveyance specifically of said track or right of way, and orator avers that the same is a material and indispensable portion of defendant's property.

Orator further avers that said instrument in writing so deposited with said Central Trust Company in escrow attempts to convey a right of way to your orator over said "neutral strip" in words as follows:

13 "Also such right as the Elyton Land Company may have conveyed to the said railroad company to a strip of land twenty-two feet wide off the north side of the common right o way north of the Alabama Great Southern Railroad right of way extending from the right of way of the South and North Alabama railroad near Twenty-fifth street westward to the east side of Eighteenth street.

"Also such right as the Elyton Land Company may have con-

veyed to said railroad company to a strip of land thirty-five feet wide off the north side of the common right of way north of the Alabama Great Southern Railroad right of way, extending from the east side of Eighteenth street to the east side of Fourteenth street."

Orator avers that according to said agreement it is entitled to a good and sufficient deed to the last-named rights of way, and your orator affirms and states it to be a fact that the Elyton Land Company has lost its right to the same, as will more fully appear by a decision of the supreme court of Alabama in a suit wherein the said land company sought to eject the South and North Alabama railroad from said "neutral strip," reported in volume 95 of Alabama Reports, page 631. Orator avers that the South and North Alabama railroad is the owner of the said strips of land on said "neutral strip," which the defendant seeks to convey to your orator. Your orator therefore states that the defendant's title thereto is absolutely worthless and in point of fact does not exist. Orator avers that the loss of said last-named strips of land defeats in a large measure the purposes and objects of orator's agreement with defendant, and that the same are a material and indispensable portion of defendant's property. The location of said strips of land, with reference to the Union depot, in said city, is marked in parallel dark lines on the map attached hereto as "Exhibit D."

8. Orator avers, as will more fully appear by reference to "Exhibit A," that the defendant in the said instrument in writing so deposited with said Central Trust Company, seeks to convey in fee-simple to your orator the following-described property, known as "Lakeview park:"

"Beginning at the point of intersection of the east side of
14 Clairemont avenue, with the northeast line of Highland avenue, thence northward along said Clairemont avenue 119.74 feet; thence ninety degrees to the right 742.2 feet; thence sixty-nine degrees and forty-five minutes to the right 438.45 feet; thence fifty-five degrees fifty-seven minutes to the left 399.95 feet; thence nine degrees thirty-four minutes to the left 997.1 feet; thence ninety degrees to th- right 587.5 feet; thence seventy-one degrees forty-seven minutes to the right 420.5 feet; thence eighteen degrees thirteen minutes to the right 538.57 feet; thence nineteen degrees thirty-nine minutes to the left 574.85 feet; thence eight degrees thirty-one minutes to the left 631.61 feet to said Highland avenue; thence in a northerly direction along said Highland avenue to the point of beginning."

Which said property orator avers is described according to the map and plan of the Elyton Land Company of the City of Birmingham, as will more fully appear by reference to said "Exhibit D."

Your orator is advised that the defendant has no legal right to dispose of said property in fee-simple, for that long before the organization of the Highland Avenue and Belt Railroad Company, the said Elyton Land Company had irrevocably dedicated said Lakeview park to the public use; that said land company some time during the year 1884, or shortly thereafter, surveyed, mapped and platted its property contiguous to and east of the then city of Birmingham,

Alabama, and divided the same into lots, blocks, alleys, streets and avenues, and marked and designated on said map the property which the defendant seeks to convey in fee-simple to your orator as "Lakeview park," and since said time said land company has continuously sold lots with reference to said map and abutting on said streets and avenues. Orator is informed, and on such information states that said park contains about seventy acres of land, and that it is reasonably worth one thousand dollars per acre. Your orator avers that before it entered into said agreement with defendant, it represented to your orator that it was the owner in fee-simple of said park, and your orator avers that according to said agreement the defendant is required to convey said property, known as
15 "Lakeview park," to your orator by a good, merchantable and vendable title; and your orator is advised by counsel, believes, and, therefore, states that the defendant has no such merchantable and vendible title to convey to your orator.

9. Orator further shows unto your honor that in said instrument in writing so deposited with said Central Trust Company, the defendant purports to convey to your orator the following strips of land:

"Also a strip twenty-two feet wide off the north side of the common right of way north of the Alabama Great Southern railroad, extending from the eastern boundary of the Elyton Land Company's property to the east side of Thirty-second street.

"Also a strip of land eleven feet wide, located in the common right of way between the eleven-foot right of way of the Mary Pratt Furnace Company and the thirteen-foot right of way of the Georgia Pacific railway, extending from the east side of Thirty-second street westward to the South and North Alabama Railroad right of way near Twenty-sixth street.

"Also a strip of land twenty-two feet in width off the north side of the common right of way north of the Alabama Great Southern Railroad right of way, extending from the east side of Fourteenth street to the line between the east half and the west half of section 2, township 18 south, range 3 west, subject to a twenty-six-foot right of way of the Georgia Pacific railway crossing said strip, and except that portion of said strip lying within the west half of the southeast quarter of section 35, township 17, range 3."

Your orator further avers that when it entered into said agreement with defendant it represented unto your orator that it was the owner of a right of way from the west side of Twenty-fourth street eastward to a point where the South and North Alabama railroad diverges toward the north from the right of way of the Alabama Great Southern railroad. But orator avers that in said instrument in writing deposited with said trust company, the defendant has made no effort to convey to orator such a right of way.

Orator further avers that the South and North Alabama
16 railroad has located its tracks on the right of way mentioned in this paragraph of the bill, extending from the east side of Fourteenth street to the line between the east half and west half of section 2, township 18, range 3 west, as aforesaid, as will more fully

appear by red lines on and near Fourteenth street on said map attached hereto and marked "Exhibit D."

Orator avers that the said South and North Alabama railroad has been operating over a portion of defendant's right of way as indicated for many years.

Orator further avers that in the years 1880–1881 the said South and North Alabama railroad constructed on the extension of said 35-foot "neutral strip" from the west side of Twenty-fourth street to the point where its road diverges towards the north from the Alabama Great Southern railroad, several tracks, and orator avers that such tracks are located on the said right of way which the defendant represented to your orator as aforesaid that it owned and which right of way the defendant has as aforesaid failed to convey to your orator in said instrument in writing deposited with said trust company.

Orator further avers that in the year 1880 or 1881 the said South and North Alabama railroad placed on an extension of said 35-foot strip, from Twenty-fifth street according to said map (Exhibit D) along and parallel with and adjoining the right of way of the Alabama Great Southern railroad eastwardly to the eastern line of section 30, township 14, range 3 west, several railroad tracks; and orator is informed and on such information states that there is a track located on the said 22-foot right of way of the defendant off the north side of the common right of way north of the Alabama Great Southern railroad, extending from the east side of Thirty-second street eastward to the east line of section 30; and orator is informed and on such information states that there is a railroad track located on the said 11-foot right of way of the Mary Pratt Furnace Company and the 13-foot right of way of the Georgia Pacific railway, extending from the east side of Thirty-second street westward to the South and North Alabama Railroad right of way near Twenty-sixth street. Orator is not informed whether
17 the tracks that are so located on defendant's right of way are the identical tracks of the said South and North Alabama railroad constructed in 1880–1881 as aforesaid. But your orator avers and states it to be a fact that there is now pending in the chancery court of Jefferson county, Alabama, a suit filed by a bill in chancery on the 31st day of December, 1891, wherein The South and North Alabama Railroad Company is complainant and The Elyton Land Company and The Highland Avenue and Belt Railroad Company are defendants, and wherein the said South and North Alabama Railroad Company is contesting with the said Highland Avenue and Belt Railroad Company the right of said portions of track between Twenty-fourth and Twenty-fifth streets as aforesaid and in and near said Fourteenth street as aforesaid; and orator avers that said suit is still pending; and orator avers that the location of defendant's said right of way west of said Fourteenth street is shown on said map hereto attached marked Exhibit D by dark parallel lines and opposite the words "Linn iron works;" and orator avers that said right of way has become isolated and rendered practically valueless by reason of the location of the said

South and North Alabama Railroad tracks thereon and by reason of the loss of the aforementioned right of way over said "neutral strip" extending from the east side of Fourteenth street eastward to the right of way of the South and North Alabama railroad near Twenty-fifth street.

And orator further avers that the said Elyton Land Company, prior to 1880, and before the organization of the defendant, extended from said neutral strip between said Fourteenth and Twenty-fifth streets as aforesaid, a 35-foot strip from the east side of Fourteenth street in a westerly direction to the western boundary of the east half of the southeast quarter of section 35, township 17, range 3 west, along and parallel with the said right of way of the Alabama Great Southern railroad, as and for a common right of way for all railroad companies doing business in and through the city of Birmingham. And orator further avers that about the same said time the Elyton Land Company also extended from said neutral strip near Twenty-fourth street as aforesaid a 35-foot strip from the west side of
18 Twenty-fourth street in an eastwardly direction to the east line of section 30, township 14 south, range 3 west, along and parallel with said right of way of the Alabama Great Southern railroad as and for a common right of way for all railroad companies doing business in and through said city; that when the said strips were extended as aforesaid, the Elyton Land Company set apart, designated and dedicated the said strips so extended for use as such common rights of way and thereafter the said land company sold and conveyed its lands and lots lying adjoining to and north of said 35-foot strip so extended and by the conveyances of and agreements to convey said lands and lots, the said land company bounded the same so sold on the south by said 35-foot strip and designated and dedicated the same as such common right of way, all of which will more fully appear from the conveyances made by said land company to Charles Linn and the Pratt Coal and Coke Company and from the bill of complaint exhibited by the Elyton Land Company against Robert Roberts, Maud Evans *et al.* on the 14th day of April, 1887, in the city court of Birmingham, true, correct and certified copies of such deeds and bill of complaint are hereto attached marked respectively "E," "F," "G" and "H," which likewise are prayed to be considered a part of this bill of complaint.

Your orator further avers that in said suit pending in said chancery court between the South and North Alabama railroad and the said Elyton Land Company and this defendant, the said South and North Alabama railroad claims the said 35-foot strips of land extended as aforesaid to have been dedicated to the public as a common right of way for all railroads entering the said city of Birmingham; and your orator avers that the rights of way which the defendant seeks to grant to your orator mentioned in this paragraph of the bill and the said right of way which should have been conveyed in said deed with said trust company, between Twenty-fourth and Twenty-fifth streets, are located upon said 35-foot strips of land extended as aforesaid; and your orator is advised by counsel, believes and therefore states, that the defendant's title

thereto is not merchantable and vendible and not the char-
19 acter of title which is called for by the said agreement of date the 31st day of December, 1894.

10. Orator avers that prior to said agreement of December 31, 1894, the defendant represented to your orator that it was the owner of a railroad track and right of way from

"Twenty-third street and Fifth avenue, south, southward along Twenty-third street to Magnolia avenue; thence along Magnolia avenue to Twenty-first street; thence along Twenty-first street to Highland avenue, said right of way being commonly called 'the loop.'"

Orator avers that said "loop" is a material and valuable portion of said property and that in said deed so deposited in escrow with said trust company no conveyance of this portion of defendant's property specifically appears. Orator avers that defendant constructed this part of its said railroad, but that it derived no title thereto from the said Elyton Land Company, and orator is informed and on such information states that it has no franchise therefor from the city of Birmingham.

11. Orator further represents and shows unto your honor that in said instrument in writing deposited in escrow as aforesaid, the defendant purports to convey a 26-foot strip of land on which is located its dummy line along the following streets and avenues of said city:

"From the intersection of Fifteenth street and Eighth avenue, south, along said Fifteenth street, south, to Tenth avenue, south; thence along Tenth avenue to Cottonwood avenue; thence through Cottonwood avenue to Eleventh avenue, south; thence through Eleventh avenue to Twentieth street and Highland avenue; thence along Highland avenue to Twenty-ninth street; thence along Twenty-ninth street to Seventh avenue, south; thence along Seventh avenue to Twenty-seventh street; thence along Twenty-seventh street to Fifth avenue, south."

Your orator avers that the railroad located on the right of way mentioned in this paragraph of this bill was built and constructed by the said Elyton Land Company and at the time of its construction and location on said last-named streets and avenues said
20 streets and avenues had been by said land company dedicated to the public use as public thoroughfares. Orator avers on information that said land company constructed said last-named railroad after it had opened said streets and avenues, after it had mapped and platted its lands, showing said streets and avenues to be public thoroughfares, after it had published its maps showing said streets and avenues to be such public thoroughfares; and orator avers that said railroad was constructed after said land company had sold portions of its lots and lands so mapped and platted and abutting upon said streets and avenues, and after it had dedicated said streets and avenues to public use, upon which it afterwards located and built its said railroad; and orator avers that every part and parcel thereof, including said strip of land of twenty-six feet, is now under the jurisdiction and control of the municipal

authorities of the city of Birmingham, Ala.; and your orator avers that in a certain suit, wherein your orator, as lessee, and The Highland Avenue and Belt Railroad Company are complainants, and The Birmingham Railway and Electric Company is defendant, instituted in the chancery court of Jefferson county, and now pending in the supreme court of Alabama, the said Birmingham Railway and Electric Company is contesting with the defendant in this suit its right to said 26-foot strip of land as a reservation, denying that the defendant herein has any exclusive right to the use of said last-named streets and avenues; and your orator further avers that about one half mile of said reservation of twenty-six feet, located in the northwest quarter of the northeast quarter of section 6, township 18, range 2 west, is subject to the dower right of one Rebecca E. Denny, as will more fully appear by reference to a decision of the supreme court of Alabama in the case of Rebecca E. Denny *vs.* The Elyton Land Company, reported in 96 Alabama, page 336.

12. Your orator further represents and shows unto your honor that in said instrument in writing deposited in escrow as aforesaid, defendant purports to convey a 26-foot strip of land located in the following streets, avenues and blocks in the said city of Birmingham:

"Fifth avenue, south, from Twenty-seventh street to Thirty-second street, along Thirty-second street southward to Highland avenue, along Thirty-second street northward to Tenth avenue, north; Tenth avenue, north, from Thirty-second street to near Fifteenth street; Eighth avenue, north, from Thirteenth street to the boundary line of the Elyton Land Company's property near Ninth street; Fifth avenue, south, from Thirteenth street to the South and North Alabama Railroad's right of way; Seventh street from Sixth avenue, south, southward to the line of the Elyton Land Company's property; First avenue, south, from Thirty-second street eastward to the line between sections 29 and 30, township 17 south, range 2 west."

Orator avers that the Belt railroad of defendant which is located on the rights of way mentioned in this paragraph of this bill of complaint was constructed on said last-named streets and avenues after the said Elyton Land Company had opened said streets and avenues; after it had mapped and platted its lands showing said streets and avenues to be public thoroughfares; after it had published its maps showing said streets and avenues to be public thoroughfares; after said land company had sold lots so mapped and platted and abutting upon said streets and avenues, and after it had dedicated said streets and avenues to public use, upon which was afterwards located and built said portions of said Belt railroad, and orator avers that every portion of the main line of said Belt railroad is now under the jurisdiction and control of the municipal authorities of the city of Birmingham, Ala.; orator avers that the defendant has no franchise from said city for the last-mentioned rights of way; and orator further avers that in and by the said act of the General Assembly of Alabama, incorporating the Highland

Avenue and Belt Railroad Company, it is enacted and provided that:

"Nothing in said act shall be so construed as to impair or abridge the power and authority of the corporate authorities of the city of Birmingham over the streets, avenues, alleys and public grounds thereof."

Orator is advised by counsel, believes and therefore states that the defendant has no exclusive right to the last-mentioned strips of land, but that the defendant has an easement thereon for the
22 operation of its railroad, and that under the constitution and laws of the State of Alabama other railroads have the right to use the same upon the payment of a reasonable compensation therefor.

Your orator avers that before it entered into said agreement with the defendant, it represented to your orator that it had the exclusive rights to said strips of land mentioned in this paragraph and that on account of such exclusive right its said Belt railroad was peculiarly valuable as a terminal road. Your orator avers that unless the title to this portion of the defendant's rights of way is held by it in fee, it will materially lessen the value of such Belt railroad as a terminal one and defeat in a large measure the purposes and objects inducing your orator to enter into said agreement of December 31, 1894.

13. Your orator avers and shows unto your honor that the defendant in point of fact does own in fee-simple certain rights of way through the following-named blocks according to said map of the city of Birmingham, to wit: Blocks 129, 12, 585, 586, 599, 600, 601, 460, 481, subdivision "E" of block 112, the northwest corner of lot 4, fronting 30 feet on the south side of Tenth avenue, north, and running back 75 feet on the east side of Thirty-second street. Orator avers that said blocks were deeded to the Highland Avenue and Belt Railroad Company by the Elyton Land Company September 14, 1887, and were by said Highland Avenue and Belt Railroad Company on the 30th day of July, 1890, deeded back to said land company by said railroad company; but orator avers that in said last-named deed the defendant specifically, by metes and bounds, reserved a right of way through said blocks for its said railroad, as will more fully appear by a copy of said last-named deed, which is hereto attached marked "Exhibit I" and prayed to be considered as a part of this bill of complaint.

Your orator avers that the defendant in said instrument in writing deposited in escrow as aforesaid, has not specifically conveyed the rights of way mentioned in this paragraph of the bill. Your orator avers that without such rights of way it would be impossible to operate the Belt railroad of the defendant with trains of freight cars, and that without such rights of way said Belt
23 railroad as conveyed would be only parts and parcels of a road: and orator avers that in said deed deposited in escrow as aforesaid, the defendant fails to convey a right of way 13 feet on either side of the center line of Avenue A, or First avenue, south, beginning in the west line of Twenty-ninth street and extending

eastward along the center of said Avenue A, or First avenue, south, of uniform width of 26 feet to the right of way of the Highland Avenue and Belt railroad in the center of Thirty-second street; also a right of way 13 feet wide for single railroad track along Walker street, extending from Eighth avenue (or Smithers' boulevard), south, as far as Martha avenue; also right of way 26 feet wide for double tracks along Walker street from Martha avenue, south, to Sallie avenue, in the town of Smithfield, adjacent to the city of Birmingham, Ala.; also right of way for railroad 26 feet wide over north end of west half of northwest quarter of section 19, township 17, range 2 west, from east to west, in said Jefferson county, specifically, which your orator affirms and states the defendant claims to have title to; and your orator avers that in said deed so deposited in escrow, the defendant seeks to convey to your orator lots 1, 2, 3, 4, 5, 6, 7, 8, in block 178, but orator avers that said lots should be in block 179, according to the map and plan of the city of Birmingham, Ala., for that it is on block 179 that the shops of said defendant are partly located.

14. Orator avers that the following tracks of the defendant are built over lands for which it has no deeds for rights of way:

A. Through the north half of block 599.

B. In Thirty-third street from Eleventh to Tenth avenues, north, to the gin factory.

C. Through the northwest corner of block 14, and on Thirteenth street *Thirteenth street* to a connection with the Kansas City, Memphis and Birmingham railroad near Seventh avenue.

D. In Avenue E from Thirty-second to Thirty-third streets, and through block 478 to the property of the Birmingham Railway Supply Company.

E. All that portion of the north half of block 340 near Avenue E and Eighth street.

24 F. Along the south line of Powell avenue, from Fifteenth to Eighteenth streets.

G. Through the southeast corner of block 755 near 21st street and Highland avenue.

H. Through block 483 connecting defendant's Belt railroad on Thirty-second street and its right of way to the Mary Pratt furnace.

I. Into the property of the Sloss Iron and Steel Company known as "City Furnaces," in Birmingham, according to said map and plan of the city of Birmingham.

Orator avers that in order to successfully operate said railroad it is necessary to own the rights of way mentioned in this paragraph; and orator avers that the right of way through block 483 is absolutely necessary to reach the Mary Pratt furnace, near the city of Birmingham.

Orator avers that before executing said agreement of December 31, 1894, the foregoing tracks were shown to the president of your orator by defendant, which represented that it was the owner thereof.

15. Orator avers that according to said agreement of date Decem-

ber 31, 1894, the defendant should procure the right of way for a railroad track to connect its Belt railroad with the Birmingham and Gate City street railroad at or near the gin factory on Tenth avenue, north; and orator avers that the defendant has not complied with the provision of said agreement.

16. Orator further shows that in said deed so deposited with said trust company, defendant seeks to convey to your orator such right as the Elyton Land Company may have conveyed to it to a strip of land 26 feet wide along the east side of the canal in the northeast quarter of the northwest quarter of section 8, township 17, range 2 west, in said county. Orator avers that it does not know the character of the said title that the defendant offers thereto, but states that under its agreement with defendant it is entitled -o a good and sufficient deed and not such right as said land company may have conveyed.

17. Orator states unto your honor that it has made no demand upon the defendant for the amount of money so expended by your orator as aforesaid and that the same was unnecessary in that the defendant is without funds to meet said demand or any considerable part thereof, and has no assets which are readily convertible into money and has no reasonable prospect of being able to meet said demand if made. And orator avers that the assets of said defendant consists of said Belt railroad, dummy line, equipment, park, etc., and orator avers, as will more fully appear by reference to Exhibit B that there are judgments of record against the defendant amounting to — which are prior to your orator's demand.

18. Your orator further avers that about the time it entered into said agreement with defendant it also entered into an agreement for the purchase of the Birmingham and Gate City street railroad from the Mercantile Trust and Deposit Company of Baltimore, Md.; that your orator went into possession of said Birmingham and Gate City street railroad and is presen-ly holding and operating the same. Orator further states that for the past year it has operated the property it received from the defendant in connection with said Birmingham and Gate City street railroad, using the rolling stock and equipment of the two said railroads interchangeably; that is to say, the Highland Avenue and Belt railroad has a portion of the rolling stock of the Birmingham and Gate City street railroad and a portion of the rails of said road also, and your orator states that there is laid about one mile of the track of the Birmingham and Gate City street railroad with rails that belong to the defendant. Orator avers that at the time said rails from the Belt railroad were placed upon the Birmingham and Gate City street railroad it was its intention to purchase both railroads, and that the use of the Belt railroad's rails was necessary in order to carry the rolling stock of the Belt railroad upon the line of the said Gate City road, and that such use was made without any protest on the part of the defendant; and your orator hereby offers to restore said rails or the value thereof if this court should direct whenever it may be determined the amount of such value. And your orator further represents and

shows unto your honor that it is ready and willing to do
26 and perform all acts and things required in law to be done or performed according to the terms and directions of your honor's court.

19. Your orator further avers that according to the principles and practice of courts of equity, it is entitled upon the facts and premises hereinbefore shown to elect, and it accordingly does elect, to bring this cause hereinbefore set forth into this court and to claim and receive therefrom the relief to which, upon which this bill and the facts to be proven thereunder, it is entitled to have decreed it herein, and which court alone can afford adequate relief to your orator in this cause. That the subject-matter of this suit, as your orator is advised and believes, is peculiarly within the jurisdiction of your honor's court of equity.

Wherefore your orator prays that your honor will take this its bill of complaint into consideration, take and receive the proofs respecting the truth of the allegations herein, and that a decree of this honorable court be made adjudging and decreeing that said agreement in writing, executed between your orator and the defendant on the 31st day of December, 1894, be rescinded and cancelled and declared to be of no effect, null and void.

2. That an equitable lien be declared upon all the properties of the defendant in favor of your orator for the said amounts expended by it in pursuance of said agreement and upon improvements and betterments as aforesaid upon the property of the defendant, and for such damages as may seem just, meet and proper to this court, after a reference to a master has been made to determine the amount of such damage.

3. That a reference be had to a master to determine the amount that may be declared as a lien in your orator's favor on all the properties of the defendant.

4. That said lien be declared as aforesaid in favor of your orator, subject, however, to the said prior-lien judgment creditors' claims and demands as may be entitled to take precedence over your orator's demand.

5. That all the properties of the defendant be sold to satisfy your orator's demand as aforesaid and the proceeds thereof be applied—
first, to the payment of the costs and expenses of said refer-
27 ence and sale and the costs and expens-s of your honor's court; s-cond, that the remainder thereof be applied to the payment and satisfaction of the demands of such persons or parties whose claims may by decree of this court be entitled to take priority and precedence over your orator's demand, then to the satisfaction and discharge of your orator's claim against the defendant as set forth in this bill, together with interest from the date of the expenditures of said amounts of money by your orator in pursuance of said contract and on betterments and improvements as aforesaid.

6. That the said Highland Avenue and Belt Railroad Company be made a party defendant to this bill of complaint; that this court will grant unto your orator a writ of subpœna to be issued out of

and under the seal of this honorable court, directed to said Highland Avenue and Belt Railroad Company, commanding it to appear, plead, answer or demur to this bill of complaint within in the time and manner as required by law, and that said defendant be required to stand to, abide and perform such other and further orders and decrees herein as to this honorable court may seem meet and proper.

7. That the court will fully administer as a trust fund all and singular the property, rights and franchises belonging to said defendant, including said lines of Belt railroad and dummy line, with all and singular its appurtenances so held by it as aforesaid and will marshal all assets and ascertain the several respective liens and priorities existing thereon and enforce and decree the rights, liens and equities of each and all the stockholders and creditors thereof as the same may be finally ascertained and decreed by the court upon the respective interventions or applications of each and every creditor or stockholder.

8. That for the purpose of enforcing the rights and equities of your orator and other creditors of said defendant, as well as of protecting the rights, interests and propo-ties of said defendant, and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since the organ-
28 ization of said Highland Avenue and Belt Railroad Company, and of preventing disruption thereof by separate executions, attachments or sequestrations, this court forthwith appoint a receiver of all and singular the property, rights, assets and franchises of every nature and wherever situated, held, owned or controlled by said defendant, together with all rights and contracts, with full authority to manage and operate the same under the direction of the court; and that all of the officers, managers, superintendents, agents and employés of the said defendant be required forthwith to deliver up to such receiver the possession of all and singular each and every part of the said property wherever situated; and also all books of accounts, vouchers and papers in every way relating to its business or the operation of its said railway; and for an injunction restraining each and every one of the officers, directors, managers, superintendents, agents and employés of the said defendant from in any way interfering with the possession and control of such receiver over such property. And your orator prays for such other or further relief as to the court may seem meet and proper and as may be necessary to fully protect and enforce the rights and equities of your orator and of all other creditors and stockholders of said defendant.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN,
Solicitors for the Complainant, The Columbian Equipment Co.

NOTE.—The defendant is required to answer the allegations of the foregoing bill of complaint from paragraphs one to nineteen, both

inclusive, but not under oath, as answer under oath is hereby expressly waived.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN.

29 On June 1, 1896, there was also filed a petition for the appointment of a receiver, and on that day the circuit court, presided over by Honorable John Bruce, district judge, entered an order appointing H. L. Underwood receiver, as prayed for, and issuing an injunction against the Highland Avenue and Belt Railroad Company and its officers, directors, and agents and employés forbidding them from in any way interfering with the possession or management of the receiver. On June 5th an answer was filed to the bill. On the 13th of June, 1896, on proper authority, the bill was amended, and on the 13th of June an answer was filed to the amended bill.

A motion having been made to dissolve the injunction and to discharge the receiver, at the instance of Honorable John Bruce, district judge, it was fixed for hearing before the Honorable
30 D. A. Pardee, circuit judge, and, after due hearing, the said motion was granted and a decree was accordingly entered discharging the receiver and dissolving the injunction. Subsequently, on June 6, 1897, the Honorable John Bruce, district judge, sitting as circuit judge, granted leave to amend the bill, and an amended bill was thereafter duly filed. On the 6th of March, 1897, the following petition for the appointment of a receiver was filed by the complainant:

31 *Petition of Complainant for Receiver.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY
vs.
HIGHLAND AVENUE AND BELT RAILROAD COMPANY. } In Equity. No. 82.

Your petitioner, The Columbian Equipment Company, respectfully makes this its application and shows unto your honor:

1. That on the 1st day of June, 1896, it filed its bill of complaint against the defendant herein, wherein it prayed for an injunction and the appointment of a receiver of all the Highland Avenue and Belt Railroad Company's property, which said bill your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

2. That on the 1st day of June, 1896, Henry L. Underwood, a resident citizen of Birmingham, Ala., was by the Hon. John Bruce, judge, etc., appointed receiver of defendant's property, but subsequently upon a motion filed by the defendant to vacate the order appointing a receiver (which said motion at the request of the Hon.

John Bruce was heard by the Honorable Don A. Pardee at New Orleans, La.), the order appointing said Underwood receiver of the properties of the defendant and the injunction in connection therewith was set aside and avoided.

Your petitioner represents and shows unto your honor that according to the terms of said decree of the Hon. Don A. Pardee vacating said order appointing said receiver, etc., a copy of which decree is hereto attached marked Exhibit A, the said receiver was required to turn over and deliver to the parties or party from whose possession he took the same all the property of every kind and description of the Highland Avenue and Belt Railroad Company which came into his hands as such receiver; that said Underwood received the properties of the defendant from your petitioner and in pursuance of said decree turned over and delivered the same into the possession of your petitioner.

32 Your petitioner further states that after said receiver had delivered into its possession said properties the said Highland Avenue and Belt Railroad Company, without due process of law, wrongfully took possession of said properties at that time under the control of your petitioner without your petitioner's consent and over its protest.

Your petitioner now charges and states that in contemplation of law the possession of said properties rest still in your petitioner; that at the time of the filing of said bill of complaint said properties were in its possession as stated in said bill, and that your petitioner is now, according to said decree and under the law, entitled to the possession of the same.

3. Your petitioner further shows unto your honor that on the 5th day of March, 1897, it filed in said cause an amendment to said original bill, which said amendment your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

4. Your petitioner further states unto your honor that the defendant is heavily involved in debt; that it is not able to pay the judgments that are of record against it, as more fully stated in said bill of complaint, amounting, to wit: to sixty-odd thousand dollars. That it is not able to pay its current expenses and fixed charges as set forth in said amendment to said bill, filed March 5, 1897, and your petitioner charges and states it to be a fact that the defendant is insolvent.

5. That your petitioner has been notified that the judgment creditors of the defendant will make application for the appointment of a receiver of its properties for the purpose of having the same sold for the satisfaction of their demands.

6. That your petitioner is advised by counsel, and therefore states, that on the facts alleged in said bill of complaint and its amendment of March 5, 1897, it is entitled under the law to retain possession of the properties of the defendant until its demand is satisfied by the defendant, or until the same is satisfied from the proceeds of a sale to be declared and ordered by some court having jurisdiction

of such matters in your petitioner's favor and such other creditors as may see fit to join in said bill.

But your petitioner states that under the circumstances of
33 this case it prefers to have an officer of your honor's court to become the custodian of defendant's properties until the legality of your petitioner's demand is established by decree of this honorable court, and so that said properties may be conserved pending the enforcement of the rights and equities of your petitioner and other creditors of said defendant, as well as protecting the rights, interests and properties of the defendant and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier, as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since its organization and of preventing disruption thereof by separate executions, attachments or sequestrations.

7. That to serve such ends as stated in the sixth paragraph of this petition the necessity exists for the appointment of a receiver forthwith to preserve the value of said property and to collect rents and profits that may accrue from the operation of said properties and railroads for application on your petitioner's debt and the other debts of the company; and that unless a receiver is appointed of the defendant's property the value thereof will become impaired and said indebtedness thereby rendered of uncertain or impossible collection.

Wherefore your petitioner prays that a receiver may be appointed forthwith to take charge of such properties under a decree of your honor's court.

Your petitioner suggests as in every way a competent and suitable person to be appointed such receiver Phillip Campbell, formerly the general manager of the Birmingham, Sheffield and Tennessee Valley railroad, lately the general manager of said railroad under the receiver thereof, Edmund A. Hopkins, heretofore appointed under an order of this honorable court, and now a resident of this district and a citizen residing at Sheffield, Ala.

HENRY D. HOTCHKISS AND
JOHN F. MARTIN,
Solicitors for Complainant.

34 And on this petition and the bill and amendments and on motion thereto of the complainant the following order was entered appointing Phillip Campbell receiver:

35 *Order Appointing Receiver Phillip Campbell.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY
vs.
HIGHLAND AVENUE AND BELT RAILROAD COMPANY *et al.* } In Equity.

Upon reading and considering the verified bill in this cause, together with the amendment thereto and the petition of the Colum-

bian Equipment Company, filed on the 6th day of March, 1897, at this term of the court, for the appointment of a receiver, on the motion of counsel for said petitioner, it is ordered by the court that the prayer of the petition be granted and that Phillip Campbell, a citizen of Sheffield, Alabama, be and is hereby appointed receiver of this court of all and singular the property, assets, rights and franchises of the Highland Avenue and Belt Railroad Company, doing business in the city of Birmingham, Alabama, described in the bill of complaint herein, wherever situated, and including all railway tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by the said company, together with all property in connection therewith, and all monies, choses in action, credits, bonds, stocks, leasehole interests, operating contracts and other assets of every kind and all other property, real, personal and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and direction of the court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

And the said Highland — and Belt Railroad Company and each and every of its officers, directors, agents and employés are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

36 Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employees as may be required for the proper discharge of the duties of his trust.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said company.

Said receiver is hereby required to give bond in the sum of

$10,000, with personal security, or the security of some responsible guaranty and indemnity company, satisfactory to the clerk of this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

And the court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims and in all respects to regulate and control the conduct of said receiver.

JOHN BRUCE, *Judge.*

April 5, 1897.

Endorsed: Filed in open court this April 5, 1897. N. W. Trimble, clerk.

37 From this order appointing the receiver the defendant took an appeal, which was allowed, as shown by the petition and accompanying order:

Petition for Appeal.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant, *v.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Defendant.	In Equity.	No. 82.

To the honorable the judges of the circuit court of the United States for the southern division of the northern district of Alabama:

The petition of The Highland Avenue and Belt Railroad Company, a body corporate under the laws of the State of Alabama, the defendant in the above-entitled cause, respectfully shows unto your honors that it is advised by counsel and believes, and therefore states that by the decree rendered by this honorable court on the 5th day of April, 1897, there is manifest error to the prejudice of your petitioner, for the correction of which your petitioner desires to appeal to the circuit court of appeals for the fifth judicial circuit of the United States, and your petitioner files herewith the assignments of error on said appeal.

Wherefore and in consideration of the premises your petitioner prays that it may be allowed to appeal from said decree rendered by this honorable court on the 5th day of April, 1897, to the said court of appeals.

38 And your petitioner further prays that the amount of its appeal bond may be fixed by your honors.

And, as in duty bound, your petitioner will ever pray.

ALEX. T. LONDON,
Solicitor for Petitioner.

Endorsed: Filed April 12th, A. D. 1897. N. W. Trimble, clerk.

39 *Order Allowing Appeal.*

COLUMBIAN EQUIPMENT COMPANY, Complainant, *v.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY, Defendant. } In Equity. No. 82.

The Highland Avenue and Belt Railroad Company, the defendant in the above-entitled cause, having this day presented and filed in open court its petition praying an appeal to the circuit court of appeals for the fifth judicial circuit from the decree rendered on the 5th day of April, 1897, together with an assignment of the errors relied on on such appeal, as required by law, and praying that the amount of the bond for said appeal may be fixed—

It is therefore ordered, adjudged, and decreed that the said petition be granted and the said appeal be allowed, as prayed in said petition. It is further ordered and decreed that the amount of the bond for such appeal without a supersedeas be, and the same is hereby, fixed at the sum of five hundred dollars.

ALECK BOARMAN, *Judge.*

April 12th, 1897.

Endorsed: Filed April 12th, A. D. 1897. N. W. Trimble, clerk.

40 On the appeal thus taken the assignments of error were as follows:

Assignment of Errors.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

COLUMBIAN EQUIPMENT COMPANY, Complainant, *vs.* HIGHLAND AVENUE AND BELT RAILROAD COMPANY *et al.*, Defendant-. } In Equity. No. 82.

Now comes The Highland Avenue and Belt Railroad Company, the defendant in the above-entitled cause, and files herewith its petition for an appeal from the decree rendered by the circuit court of the United States for the southern division of the northern district of Alabama, in the above-stated cause, on the 5th day of April, 1897, and says that in the record and proceedings in the said cause there is manifest error in this, to wit:

1. That the court erred in holding that it had jurisdiction to grant the injunction as prayed.

2. The court erred in entertaining jurisdiction of a suit in equity to subject property of the defendant corporation, in advance of the recovery of judgment at law, to the payment of a simple contract,

when said debt is not secured by a lien or mortgage, because under the Constitution the defendant company is entitled to a trial by jury.

3. The court erred in granting an injunction to a simple contract creditor, without a lien or mortgage, and thereby, prior to judgment, interfering with the possession of the property of this defendant, and requiring this defendant to surrender possession of its property to the receiver named.

4. The court erred in granting the mandatory injunction requiring the defendant corporation to deliver all of its property and assets to the receiver named.

5. The court erred in granting the decree which in effect restrains this defendant, its officers and agents, from in anywise interfering with or controlling its property.

6. The court erred in granting said injunction on the facts presented on the hearing.

ALEX. T. LONDON,
Solicitor for Appellant.

Endorsed: Filed April 12th, 1897. N. W. Trimble, clerk.

41 On this appeal the cause came on for hearing, when a motion was duly made to dismiss the appeal on the ground that the circuit court of appeals for the fifth circuit was without jurisdiction to entertain the appeal, because the order appealed from did not grant an injunction or was not equivalent to an order granting an injunction, and that the decree appointing a receiver, being interlocutory and not final, was not susceptible of being appealed from.

The question upon which instructions are desired and respectfully asked is, Was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction or the necessary equivalent of an injunction?

June 16, 1897.

42 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 41 pages, numbered from 1 to 41, inclusive, contain a full and perfect transcript of the certificate to the Supreme Court made by said circuit court of appeals in the cause of—

HIGHLAND AVENUE AND BELT RAILROAD COMPANY
vs.
COLUMBIAN EQUIPMENT COMPANY. } No. 595.

as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 9th day of July, A. D. 1897.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,640. U. S. circuit court of appeals, 5th circuit. Term No., 427. The Highland Avenue & Belt Railroad Company, appellant, *vs.* Columbian Equipment Company. Certificate. Filed July 29, 1897.

In Supreme Court of United States

OCTOBER TERM, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,
Appellant,
vs.
COLUMBIAN EQUIPMENT COMPANY,
Appellee,
No. 427.

On Certificate from the United States Court of Appeals, for the Fifth Judicial Circuit.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The above named Appellant, the Highland Avenue & Belt Railroad Company, respectfully moves the Court to advance the above entitled cause, and in support of its said motion begs leave to submit the following statement:

The original bill in this cause was filed in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, and after notice, the Circuit Court appointed a Receiver of the property of moveant, by an order in the following terms:

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

Columbian Equipment Company vs. Highland Avenue and Belt Railroad Company, et al.—In Equity.

Upon reading and considering the verified bill in this cause, together with the amendment thereto and the petition of the Columbian Equipment Company, filed on the 6th day of March, 1897, at this term of the Court, for the appointment of a receiver, on the motion of counsel for said petitioner, it is ordered by the Court that the prayer of the petition be granted and that Phillip Campbell, a citizen of Sheffield, Alabama, be and is hereby appointed receiver of this Court of all and singular the property, assets, rights and franchises of the Highland Avenue and Belt Railroad Company, doing business in the City of Birmingham, Alabama, described in the bill of complaint herein, wherever situated, and including all railway tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by the said Company, together with all property in connection therewith, and all monies, choses in action, credits, bonds stocks, leasehold interests, operating contracts and other assets of every kind

and all other property, real, personal and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and direction of the Court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said Company.

And the said Highland Avenue and Belt Railroad Company and each and every of its officers, directors, agents and employes are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said Company, and to collect and receive all income therefrom and all debts due said Company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employees as may be required for the proper discharge of the duties of his trust.

Said receiver is hereby fully authorized and empowered

to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any Court against said Company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said Company.

Said receiver is hereby required to give bond in the sum of $10,000, with personal security, or the security of some responsible Guaranty and Indemnity Company, satisfactory to the Clerk of this Court, for the faithful discharge of his duties, and is also required to make and file full reports in this Court quarterly.

And the Court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims, and in all respects to regulate and control the conduct of said receiver.

JOHN BRUCE, Judge.

April 5, 1897.

Endorsed—Filed in open Court this April 5, 1897.

N. W. TRIMBLE, Clerk.

That from this order, moveant prayed for and was allowed an appeal to the Circuit Court of Appeals for the Fifth Circuit, and said appeal was perfected and the cause duly docketed in said Court of Appeals. That the said appeal

was prayed for and allowed under the provisions of Section 7, of the Act of Congress approved March 3, 1891, as amended by the Act of Congress approved February 18, 1895.

On this appeal, the cause came on for hearing, when a motion was duly made by appellee to dismiss the appeal on the ground that the Circuit Court of Appeals for the Fifth Circuit, was without jurisdiction to entertain the appeal, because the order appealed from did not grant an injunction, or was not equivalent to an order granting an injunction, and that, the decree appointing a receiver being interlocutory and not final, was not susceptible of being appealed from.

And thereupon the said Circuit Court of Appeals, of its own motion, under the provisions of the Act of Congress, has certified to this Honorable Court the question "was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction, or the necessary equivalent of an injunction."

Moveant further shows unto your Honors that the question presented by the record is one of great importance to suitors generally and involves the jurisdiction of the Circuit Court of Appeals; that the same was certified to this Honorable Court without any action or motion on the part of moveant, and moveant shows unto your Honors that by the terms of the Act of Congress it is provided that such appeal "shall take precedence in the appellate court."

And moveant further shows unto your Honors that since said question was so certified, the Circuit Court of the United States, has, on the application of the appellee, made an order suspending all action in the cause by moveant in the said Circuit Court, until said appeal is determined.

Moveant further shows unto your Honors that pursuant to the terms of said order appointing said Campbell, as Receiver of its property, moveant has delivered possession of all of its property to said receiver, and though moveant has requested the Circuit Court to pass upon and determine the equities of the bill in said cause, upon demurrer to the bill as amended, said Circuit Court has declined, and still declines to do so.

Wherefore, moveant respectfully prays your Honors to advance said cause for hearing, or to permit said cause to be submitted for decision on printed briefs.

Samuel A. Putnam
Alex. T. Landon
Attorneys for Motion.

Supreme Court
FILED
OCT 25 1897
JAMES H. McKENNEY
CLERK

No. 427.

S. 18,80 Post Job Printing House -N. Y.

Brf. of Hotchkiss for Appellee (

Filed Oct. 25, 1897.

United States Supreme Court.

Highland Avenue and Belt Railroad Company	
vs.	427
Columbian Equipment Company.	

Brief of Henry D. Hotchkiss, Esq., in opposition to motion to advance.

First.—The motion is premature. The record is not yet printed. Counsel has not even seen a copy of the question certified as it appears of record. He has only heard what the question is.

Second.—It is doubtful whether the cause is properly in this court at all.

Section 6 of the Act of March 3d, 1891, gives to Circuit Courts of Appeal power to certify questions which are "within its *appellate* jurisdiction."

We understand the question certified is, whether the Court in the Fifth Circuit had jurisdiction to hear the appeal of the railroad company herein. Therefore, if the Court had *not* jurisdiction, it could not certify.

The motion to advance really involves an inquiry into the very question certified. We do not understand that this Court will hear or decide *such* questions on such motions. The motion to advance should therefore be denied.

Third.—We find nothing in the rules authorizing this motion to advance.

Rule 32, as amended November 28th, 1892, applies only to "cases brought to this Court by writ of error or appeal under the Act of February 25th, 1889, Chapter 236, or under Section 5 of the Act of March 3d, 1891, Chapter 517" (to wit, by writ or error or appeal).

This cause is here on certification and not by appeal or writ of error.

Fourth.—The case is not within Rule 26. There are no "special or peculiar circumstances," which entitles this railroad company to have its cause heard out of its regular order. The mere fact that a common-law Receiver is in possession of the property, *pendente lite*, is of no weight. If it were, we believe it would furnish an entirely new precedent in this Court.

The motion should be denied.

But should the motion be granted, we ask that the cause be set for a day not less than four (4) weeks after we shall have had an opportunity to obtain a printed copy of the record.

HENRY D. HOTCHKISS,
Of Counsel for Columbian Equipment Company.

In the Supreme Court of the United States.

October TERM, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,
Appellant,
vs.
COLUMBIAN EQUIPMENT COMPANY,
Appellee.
No. 427.

Certificate from the Circuit Court of Appeals for the Fifth Circuit.

BRIEF AND ARGUMENT OF ALEXANDER T. LONDON FOR APPELLANT.

Statement of Facts.

On June 1, 1896, the Columbian Equipment Company, a West Virginia corporation, filed its bill against the Highland Avenue & Belt Railroad Company, an Alabama Corporation, and therein alleged that on or before the 31st day

of December, 1894, the defendant was engaged in operating a belt railroad and dummy line in and through the city of Birmingham, Alabama, in the county of Jefferson, and on said date entered into an agreement in writing with the complainant for the sale of all of the properties, which agreement is in the words and figures as follows, to-wit:

"STATE OF ALABAMA,
JEFFERSON COUNTY.

An agreement entered into this, the 31st day of December, 1894, by and between the Highland Avenue & Belt Railroad Company, a corporation created and organized under the laws of Alabama, hereinafter termed the Railroad Company, party of the first part, and the Columbian Equipment Company, a corporation created and organized under the laws of West Virginia, hereinafter designated the Equipment Company, party of the second part;

Whereas, the parties of the first part have entered into a preliminary agreement in respect to the matters herein provided and contracted for as appears by the records and proceedings of the said two corporations;

And whereas, by a resolution of the Board of Directors held on the 30th day of November, 1894, the terms of this contract were agreed upon and Henry M. Caldwell was authorized on behalf of the Railroad Company to execute the same;

And whereas, the said parties hereto are each respectively expressly authorized by their respective charters to enter into this contract. Now this agreement witnesseth:

1. The Railroad Company does hereby lease and let to the Equipment Company all of its railroad, with all of the rolling stock, engines, tools, machines, equipments, supplies

and materials of all kinds now used or to be used in connection therewith, and also all real estate, personal property, franchises, rights of way and privileges for the period of eighteen (18) calender months from the first day of December, 1894, at and for the rental of five ($5) dollars per annum, and the proportionate part of said sum for any less time than one year, the said rental to be payable on the termination of said lease.

2. The Railroad Company covenants and agrees that it will procure at its own cost and expense for the benefit of said Equipment Company, within two (2) months from the first day of December, 1894, the right of way neccessary for a railroad track to connect the line of the Birmingham and Gate City Street Railroad with the track of the Highland Avenue & Belt Railroad at or near the gin factory on Tenth avenue.

3. Said Railroad Company further agrees that said Equipment Company shall have the right and option at any time during the continuance of said lease, to purchase all the said railroad, real estate, property, franchises, privileges and rights of way of said Railroad Company for the sum of three hundred and fifty thousand ($350,000) dollars upon the following conditions and terms: For said option and privilege the said Equipment Company shall pay to the said Railroad Company the sum of thirty-five thousand ($35,000) dollars, as follows: Twenty thousand ($20,000) dollars on or before the 1st of January, 1895, at which time the Railroad Company will deliver the possession of all of said railroad, real ertate, property, franchises, privileges and rights of way to said Equipment Comprny, and Fifteen Thousand ($15,000) Dollars on or before the fifteenth day of February, 1895.

In the event of a failure to pay said Fifteen Thousand ($15,000) Dollars by the fifteenth day of February, 1895, said privilege and option shall on that day cease and determine, and the Twenty Thousand ($20,000.00) Dollars previously paid shall be thereby forfeited and the possession of the property shall be forthwith restored to the Railroad Company. In case the said Equipment Company shall exercise its right and option to make said purchase within the time above specified to-wit: During the continuance of this lease, said sum of thirty five thousand ($35,000.00) dollars so paid as aforesaid shall be considered and treated as a part of the purchase price and the residue to be paid with interest at the rate of five (5) per centum per annum, from the 1st day of January, 1895, to the time of payment.

4. The said Railroad Company hereby agrees to have prepared and duly executed to said Equipment Company within thirty (30) days after the payment of said sum of Fifteen Thousand ($15,000.00) Dollars, as herein provided, good and sufficient deed or deeds of conveyance and transfer of all of said railroad, real estate, property, franchises and right of way and to deposit said deed or deeds and transfers with the Central Trust Company of the City of New York in escrow to be deliverd to said Equipment Company whenever within the period of said option to wit: On or before the 1st day of June, 1896, said sum of three hundred and fifteen ($315,000.00) dollars with the interest thereon at five per centum per annum from the 1st of January, 1895, shall have been deposited in said Central Trust Company to the credit and subject to the check of the Railroad Company, less any amounts which the Equipment Company may, in the meantime, have seen fit to pay or to advance to said Railroad

Company. Said Railroad Company further covenants and agrees that it will make said conveyance and transfer of said railroad, real estate, property, franchises and right of way, free and unencumbered of all liability, and will pay off and discharge all liens, taxes or judgments which now exists or which may hereafter be obtained upon the liabilities of the railroad existing on the first day of December, 1894.

5. Said Railroad Company agrees that it will apply a portion of said thirty-five thousand ($35,000.00) dollars to the satisfaction in part of the judgments now existing as a lien on said property. It further agrees that it will protect the said Equipment Company in the operation of said property from the judgments already recovered against it or which may hereafter be recovered on liabilities existing as aforesaid, so that the same shall not interfere with the operation of said property by the said Equipment Company.

6. In the event the said Equipment Company fails within the period of said option and privilege, to-wit: On or before the first day of June, 1896, to pay said sum of three hundred and fifteen thousand ($315,000.00) dollars, with interest, as aforesaid, less such sum to which it may be entitled as credits thereon, if any, said option and privilege to purchase shall thereupon and thereby, and without further notice, absolutely cease and determine, and the said Equipment Company will restore to said Railroad Company the possession of the said railroad, real estate, property, franchises and right of way, free and discharged of any lien, interest, claim or demand done or suffered by said Equipment Company, except the taxes for the year 1895; and the said Central Trust Company shall in that event, return to the said Railroad Company the deeds, conveyances, transfers and

agreements which may be deposited in escrow with it without the payment of any commission or other charge whatsoever upon the same.

7. Said Equipment Company covenants and agrees on its part that it will pay said sum of thirty five thousand ($35,000.00) dollars as herein provided. That during the term of said lease, and within six (6) months from the first day of January, 1895, it will make or cause to be made improvements and betterments on the property and equipments of said Railroad Company, at an expenditure of not less than ten thousand ($10,000.00) dollars. The said Equipment Company also agrees that it will pay the taxes on said property for the current year, and the amount so paid for taxes, with interest at five (5) per centum per annum, shall be regarded and treated as a credit on said sum of three hundred and fifteen thousand ($315,000.00) dollars, to be paid in the event it shall exercise the option herein provided; and the said Equipment Company further agrees that it will advance and pay such additional sum as may be necessary to pay said judgments recovered and to be recovered as aforesaid, in the event the said Railroad Company cannot postpone the payment of the same until after the time when the said Equipment Company shall exercise its said option; said agreement being subject to the agreement on the part of the Railroad Company to protect the said Equipment Company against interference in the operation of said property, by said judgments.

In witness whereof the Highland Avenue and Belt Railroad Company authorizes this contract to be executed by Henry M. Caldwell, one of its directors, and its corporate

seal to be hereto attached this, the day and date first above written.

Executed in duplicate.

HIGHLAND AVENUE & BELT RAILROAD COMPANY.

Per H. M. CALDWELL, Director, with full power to act.

[SEAL.]

The Columbian Equipment Company hereby accepts the foregoing lease and contract, and in witness thereof has caused the same to be executed by its President and Secretary, and its corporate seal to be hereto affixed, in duplicate, the day and date as aforesaid.

THE COLUMBIAN EQUIPMENT COMPANY,

WAYLAND TRASK, President.

CLARENCE E. STUMP, Secretary.

[SEAL.]

The bill then proceeds among other things to allege that the complainant took possession of the belt railroad and dummy line and other properties of the defendant, holding and operating them continuously until the present time; that the complainant under the aforesaid agreement has paid the sum of $35,000 in cash and in addition thereto has expended on improvements and betterments a large sum, to the amount of $27,108.56, and that the defendant did not until the first week in May, 1896, deposit with the Central Trust Company of the City of New York an instrument in writing, in escrow, purporting to be a deed of conveyance and transfer, a copy of which instrument is attached and made part of the bill. The bill then sets out that prior to the execution of the agreement, various and sundry specific representations were made

by the defendant to the complainant as to the extent and title of the property of the defendant, and then charges that to several parts of the property, right of way, etc., the defendant had no title, or not full title—all this being charged at length and in detail, but not necessary for the purposes of this case to recite. It is to be noticed, however, that the bill nowhere charges that the complainant acted upon or was deceived by any of the representations of the defendants, nor that the complainant accepted or availed itself of its option to purchase the properties of the Belt Railroad within the time prescribed in the agreement or since. The bill charges the insolvency of the Highland Belt Railroad Company, the necessity of keeping the property as a whole, to preserve the same and to ward off execution, etc. The bill prays for a decree adjudging that the contract be rescinded, canceled, declared of no effect, null and void; that an equitable lien be declared upon all the property of the defendant in favor of the complainant for the amounts expended by complainant under and in pursuance of the agreement, and for such damages as may seem just and proper; that all the properties of the defendant be sold to satisfy complainant's demand, the proceeds to be applied to the payment of costs and expenses and demands of such person or parties as may by decree of the court be entitled to priority over the payment of orator's claim; for the marshalling and distribution of assets; for the appointment of a receiver, and for an injunction.

On June 1, 1896, there was also filed a petition for the appointment of a receiver, and on that day the Circuit Court, presided over by Honorable John Bruce, District Judge, entered an order appointing H. L. Underwood receiver as prayed for, and issuing an injunction against the Highland

Avenue and Belt Railroad Company, and its officers, directors and agents, and employes, forbidding them from in any way interfering with the possession or management of the receiver. On June 5th an answer was filed to the bill. On June 13, 1896, on proper authority, the bill was amended, and on the 13th of June an answer was filed to the amended bill. A motion having been made to dissolve the injunction and to discharge the receiver, at the instance of Honorable John Bruce, District Judge, it was fixed for hearing before the Honorable D. A. Pardee, Circuit Judge, and after due hearing, the said motion was granted and a decree was accordingly entered discharging the receiver and dissolving the injunction. Subsequently, on June 6, 1897, the Honorable John Bruce, District Judge, sitting as Circuit Judge, granted leave to amend the bill and an amended bill was thereafter duly filed. On the 6th of March, 1897, the following petition for the appointment of a receiver was filed by the complainant.

Record p. 19.

Petition of Complainant for Receiver.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company vs. Highland Avenue & Belt Railroad Company—In Equity No. 82.

Your petitioner, the Columbian Equipment Company, respectfully makes this its application and shows unto your Honor:

1. That on the first day of June, 1896, it filed its bill of complaint against the defendant herein, wherein it prayed

for an injunction and the appointment of a Receiver of all the Highland Avenue & Belt Railroad Company's property, which said bill your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

2. That on the first day of June, 1896, Henry L. Underwood, a resident citizen of Birmingham, Ala., was by the Hon. John Bruce, Judge, etc., appointed Receiver of defendant's property, but subsequently upon a motion filed by the defendant to vacate the order appointing a Receiver (which said motion at the request of the Hon. John Bruce was heard by the Honorable Don A. Pardee at New Orleans, La.), the order appointing said Underwood Receiver of the properties of the defendant and the injunction in connection therewith was set aside and avoided.

Your petitioner represents and shows unto your Honor that according to the terms of said decree of the Hon. Don A. Pardee vacating said order appointing said Receiver, etc., a copy of which decree is hereto attached marked Exhibit A, the said Receiver was required to turn over and deliver to the parties or party from whose possession he took the same all the property of every kind and description of the Highland Avenue & Belt Railroad Company which came into his hands as such Receiver; that said Underwood received the properties of the defendant from your petitioner and in pursuance of said decree turned over and delivered the same into the possession of your petitioner.

Your petitioner further states that after said Receiver had delivered into its possession said properties the said Highland Avenue & Belt Railroad Company, without due process of law, wrongfully took possession of said properties

at that time under the control of your petitioner without your petitioner's consent and over its protest.

Your petitioner now charges and states that in contemplation of law the possession of said properties rest still in your petitioner; that at the time of the filing of said bill of complaint said properties were in its possession as stated in said bill, and that your petitioner is now, according to said decree and under the law, entitled to the possession of the same.

3. Your petitioner further shows unto your Honor that on the 5th day of March, 1897, it filed in said cause an amendment to said original bill, which said amendment your petitioner adopts as a part of this petition and begs leave to refer to the same whenever it may so desire.

4. Your petitioner further states unto your Honor that the defendant is heavily involved in debt; that it is not able to pay the judgments that are of record against it, as more fully stated in said bill of complaint, amounting, to-wit: to sixty-odd thousand dollars; that it is not able to pay its current expenses and fixed charges as set forth in said amendment to said bill, filed March 5, 1897, and your petitioner charges and states it to be a fact that the defendant is insolvent.

5. That your petitioner has been notified that the judgment creditors of the defendant will make application for the appointment of a Receiver of its properties for the purpose of having the same sold for the satisfaction of their demands.

6. That your petitioner is advised by counsel, and therefore states, that on the facts alleged in said bill of complaint and its amendment of March 5, 1897, it is entitled under the law to retain possession of the properties of the

defendant until its demand is satisfied by the defendant, or until the same is satisfied from the proceeds of a sale to be declared and ordered by some court having jurisdiction of such matters in your petitioner's favor and such other creditors as may see fit to join in said bill.

But your petitioner states that under the circumstances of this case it prefers to have an officer of your Honor's Court to become the custodian of defendant's properties until the legality of your petitioner's demand is established by decree of this Honorable Court, and so that said properties may be conserved pending the enforcement of the rights and equities of your petitioner and other creditors of said defendant, as well as protecting the rights, interests and properties of the defendant and to secure as far as possible the performance of the duties which said defendant owes to the public as a common carrier, as well as to preserve the unity of the business and property of said defendant as the same has been maintained and operated since its organization and of preventing disruption thereof by separate executions, attachments or sequestrations.

7. That to serve such ends as stated in the sixth paragraph of this petition the necessity exists for the appointment of a Receiver forthwith to preserve the value of said property and to collect rents and profits that may accrue from the operation of said properties and railroads for application on your petitioner's debt and the other debts of the company; and that unless a Receiver is appointed of the defendant's property the value thereof will become impaired and said indebtedness thereby rendered of uncertain or impossible collection.

Wherefore your petitioner prays that a Receiver may be

appointed forthwith to take charge of such properties under a decree of your Honor's Court.

Your petitioner suggests as in every way a competent and suitable person to be appointed such receiver Phillip Campbell, formerly the General Manager of the Birmingham, Sheffield and Tennessee Valley Railroad, lately the General Manager of said railroad under the Receiver thereof, Edmund A. Hopkins, heretofore appointed under an order of this Honorable Court, and now a resident of this district and a citizen residing at Sheffield, Ala.

HENRY D. HOTCHKISS and
JOHN F. MARTIN,
Solicitors for Complainant.

Record p. 21.

And on this petition and the bill and amendments, and on motion thereto of the complainant the following order was entered appointing Phillip Campbell as receiver:

Order Appointing Receiver Phillip Campbell.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company vs. Highland Avenue & Belt Railroad Company, et al.—In Equity.

Upon reading and considering the verified bill in this cause, together with the amendment thereto and the petition of the Columbian Equipment Company, filed on the 6th day of March, 1897, at this term of the Court, for the appointment of a receiver, on the motion of counsel for said petitioner, it is ordered by the Court that the prayer of the petition be

granted and that Phillip Campbell, a citizen of Sheffield, Alabama, be and is hereby appointed receiver of this Court of all and singular the property, assets, rights and franchises of the Highland Avenue & Belt Railroad Company, doing business in the city of Birmingham, Alabama, described in the bill of complaint herein, wherever situated, and including all railway tracks, terminal facilities, real estate, warehouses, offices, stations and all other buildings and property of every kind owned, held, possessed or controlled by the said Company, together with all property in connection therewith, and all monies, choses in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind and all other property, real, personal and mixed, held or possessed by it, to have and to hold the same as the officer of and under the orders and direction of the Court.

The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

And the said Highland Avenue & Belt Railroad Company and each and every of its officers, directors, agents and employes are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

Said receiver is hereby fully authorized to continue the business and operate the railway of said Company and manage all its property at his discretion in such manner as will, in his judgment produce the most satisfactory results con-

sistent with the discharge of the public duties imposed on said Company, and to collect and receive all income therefrom and all debts due said Company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employes as may be required for the proper discharge of the duties of his trust.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any Court against said Company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said Company.

Said receiver is hereby required to give bond in the sum of $10,000, with personal security, or the security of some responsible Guaranty and Indemnity Company, satisfactory to the Clerk of this Court, for the faithful discharge of his duties, and is also required to make and file full reports in this Court quarterly.

And the Court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims, and in all respects to regulate and control the conduct of said Receiver.

JOHN BRUCE, Judge.

April 5, 1897.

Endorsed—Filed in open Court this April 5, 1897.

N. W. TRIMBLE, Clerk.

Record p. 23.

From this order appointing the Receiver the defendant took an appeal, which was allowed, as shown by the petition and accompanying order:

Petition for Appeal.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, Defendant.—In Equity. No. 82.

To the Honorable, the Judges of the Circuit Court of the United States for the Southern Division of the Northern District of Alabama:

The petition of the Highland Avenue & Belt Railroad Company, a body corporate under the laws of the State of Alabama, the defendant in the above entitled cause, respectfully shows unto your Honors that it is advised by counsel, and believes and therefore states that by the decree rendered by this Honorable Court on the 5th day of April, 1897, there is manifest error to the prejudice of your petitioner, for the correction of which your petitioner desires to appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit of the United States, and your petitioner files herewith the assignments of error on said appeal.

Wherefore, and in consideration of the premises, your petitioner prays that it may be allowed to appeal from said decree rendered by this Honorable Court on the 5th day of April, 1897, to the said Court of Appeals.

And your petitioner further prays that the amount of its appeal bond may be fixed by your Honors.

And as in duty bound, your petitioner will ever pray.

ALEX T. LONDON, Solicitor for Petitioner.

Endorsed—Filed April 12th, A. D. 1897.

N. W. TRIMBLE, Clerk.

Record p. 23.

Order Allowing Appeal.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, Defendant.—In Equity. No. 82.

The Highland Avenue and Belt Railroad Company, the defendant in the above entitled cause, having this day presented and filed in open Court, its petition praying an appeal to the Circuit Court of Appeals for the Fifth Judicial Circuit, from the decree rendered on the 5th day of April, 1897, together with an assignment of the errors relied on on such appeal, as required by law, and praying that the amount of the bond for said appeal may be fixed.

It is therefore ordered, adjudged and decreed that the said petition be granted, and the said appeal be allowed as prayed in said petition. It is further ordered and decreed that the amount of the bond for such appeal without a supersedeas be, and the same is hereby fixed at the sum of five hundred dollars.

April 12, 1897. ALECK BOARMAN, Judge.

Endorsed—Filed April 12, A. D., 1897.

N W. TRIMBLE, Clerk.

Record p. 24.

On the appeal thus taken the assignments of error were as follows:

Assignment of Errors.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

Columbian Equipment Company, Complainant, vs. Highland Avenue and Belt Railroad Company, et al., Defendant. —In Equity. No. 82.

Now comes the Highland Avenue and Belt Railroad Company, the defendant in the above entitled cause, and files herewith its petition for an appeal from the decree rendered by the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, in the above stated cause, on the 5th day of April, 1897, and says that in the record and proceedings in the said cause there is manifest error in this, to-wit:

1. That the Court erred in holding that it had jurisdiction to grant the injunction as prayed.

2. The Court erred in entertaining jurisdiction of a suit in equity to subject property of the defendant corporation, in advance of the recovery of judgment at law, to the payment of a simple contract, when said debt is not secured by a lien or mortgage, because under the constitution the defendant company is entitled to a trial by jury.

3. The Court erred in granting an injunction to a simple contract creditor, without a lien or mortgage, and thereby, prior to judgment, interfering with the possession of the property of this defendant, and requiring this defendant to surrender possession of its property to the Receiver named.

4. The Court erred in granting the mandatory injunction requiring the defendant corporation to deliver all of its property and assets to the receiver named.

5. The Court erred in granting the decree which in effect restrains this defendant, its officers and agents, from in any wise interfering with or controlling its property.

6. The Court erred in granting said injunction on the facts presented on the hearing.

ALEX T. LONDON, Solicitor for Appellant.

Endorsed—Filed April 12, 1897.

N. W. TRIMBLE, Clerk.

Record p. 25.

A motion was made in the Court of Appeals to dismiss the appeal for the want of jurisdiction, because the order appealed from did not grant an injunction, and was not equivalent to an order granting an injunction, and that the decree appealed from being interlocutory, and not final, was not susceptible of being appealed from.

The Circuit Court of Appeals, desiring the instruction of this Court, has of its own motion certified to this Court the following question:

"Was the decree appointing Campbell Receiver above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction, or the necessary equivalent of an injunction?"

Record p. 25.

ARGUMENT.

An answer to the question certified involves the proper construction of Section 7 of the Act of Congress approved March 3d, 1891, as amended by the act approved February

18th, 1895. The amendments not affecting the statute, so far as this case is concerned, I omit the original statute.

Section 7 of the original act, as amended, is as follows:

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the Court below shall not be stayed, unless otherwise ordered by that Court during the pendency of such appeal; and provided further, That the Court below may in its discretion require as a condition of the appeal an additional injunction bond."

I.

Acts Extending the Right of Appeal Should be Liberally Construed.

Statutes giving the right of appeal are liberally construed in furtherance of justice; such an interpretation as will work a forfeiture of that right is not favored. * * * An act intended to extend the right of appeal is remedial and should receive a liberal construction.

Southerland Stat. Constr., Sec. 440, citing Converse vs. Burrows, 2 Minn., 229.

Vigo's case, 21 Wall., 648.

In *Lyde vs. Bernard*, 1 M. & W. 113, Parke, B. said: "I admit that words may be construed in a sense different from their ordinary one, when the context requires it, or when the act is intended to remedy some existing mischief, and such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy."

In *Heydenfeldt vs. Daney Gold Min. Co.*, 93 U. S., 634, 638, this Court in an opinion by Mr. Justice Miller, says:

"'It is better always,' says Judge Sharswood, 'to adhere to a plain, common sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction. Gyger's Estate, 65 Penn. St., 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act, taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.'"

In *Smith vs. Townsend*, 148 U. S., 490, 494, the cardinal rules for the construction of statutes are thus declared:

"It is well settled that where the language of a statute is in any manner ambiguous, or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times, and the defect or mischief which the statute was intended to remedy. Thus in Heydon's case, 3 Rep. 7 b., it is stated that it was resolved by the Barons of the Exchequer as follows: 'For the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging, of the common law, four things are to be dis-

cerned and considered: 1. What was the common law before the making of the act? 2. What was the mischief and defect for which the common law does not provide? 3. What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth. 4. The true reason of the remedy.'

"And by this Court, in United States vs. Union Pacific Railroad, 91 U. S., 72, 79, it was said that 'Courts, in construing a statute, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it. Aldridge vs. Williams, 3 How., 24; Preston vs. Browder, 1 Wheat., 120.'"

II.

The Statute has been Uniformly held Remedial, and the Greatest Liberality has been Shown in its Construction to Advance the Remedy.

I will discuss briefly all the decisions which I have been able to find, bearing on the question:

Dudley E. Jones Co. vs. Munger, etc. Mfg. Co. (Dec. 7, 1891), 49 Fed. 61, I. C. C. A., 158, in the Circuit Court of Appeals for the Fifth Circuit, is the earliest case construing Section 7. This was a Bill filed to enjoin the infringement of a patent; an injunction was granted and a reference ordered to state an account; the appeal was from the decree granting the injunction, and the Court of Appeals considered the case on its merits, reversed the decree below, and directed the bill to be dismissed.

On an application for a rehearing, 50 Fed. 785, I. C. C.

A., 668 (May 30, 1892), on the ground that the Appellate Court was without jurisdiction, Pardee, Judge, delivers the opinion of the Court, and, construing this section, uses the following language, p. 786: "An allowance of an appeal from an interlocutory order or decree, granting or continuing an injunction in an equity cause under the seventh section of the Judiciary Act of 1891, is a new feature of the practice in the United States Courts. Being of a highly remedial nature, it ought to be construed so as to give full force to the intention of the law maker. *The mischief to be remedied by the act was that injunctions which deprived parties of the possession and control of property, or compelled enforced action in the use of the property, were, under the practice of the Courts, frequently rendered long before the final hearing in the case, and operated to a great extent, in the nature of execution before judgment.* This mischief was as great in patent cases, where parties on hearing preliminary to the final decree, were enjoined, pending long and tedious examinations in the matter solely of accounting, as in any other cases of preliminary injunctions." The italics are mine.

Richmond vs. Atwood (Sept. 27, 1892), which, as Judge Pardee says, is on all fours with the case then before the Court, was also a patent case, in which a decree for an interlocutory injunction had been granted, and the appeal was from that decree.

The appeal was heard and the decree reversed by the Circuit Court of Appeals for the First Circuit, the question of jurisdiction not being presented.

48 Fed., 910, I. C. C. A., 144.

As in the case of the *Dudley Company vs. The Munger Company*, supra, there was an application for a rehearing,

and the question of the jurisdiction of the court was elaborately discussed.

Pending the application for a rehearing in this last case, the rehearing in *Dudley E. Jones Co. vs. Munger Co.* had been disposed of. The original appeal in Richmond vs. Atwood was disposed of in February; in the following September, Judge Aldrich, for the Court, delivered a learned opinion, declaring the construction of Section 7, and also the proper scope of the mandate.

52 Fed. 10, 2, C. C. A., 596.

The Court, after quoting Section 7, says, p. 20: "Of course in our endeavor to ascertain the meaning of this section of the statute, we must bear in mind that, prior to its enactment, an appeal from an interlocutory order was unknown in the Federal Courts. Having in view, therefore, this rule of law, and the plain language of the statute; considering also that the purpose of the lawmaker, plainly expressed, was to give the right of appeal not conferred by the general provisions of the statute as to appeals, from final decisions, it seems to us evident that it was intended to *remove the restrictions and extend the right to all that class of interlocutory orders or decrees which interfere with the possession of property, or operate in restraint of a party's business.*" The italics are mine.

Again on p. 22: "We think the term 'interlocutory order or decree' was used in its broadest sense, and that the purpose of Congress was to confer the right of appeal from any decree or order granting an injunction, at any stage of the proceeding, whether technically preliminary, interlocutory or final."

"As already said, we think the term was used in its

broadest sense, and, in our opinion, full scope should be given to this provision of the statute, to the end that any party aggrieved by any order or decree granting an injunction, at any stage of the proceedings, may have a speedy remedy by appeal. *It is plain that the policy intended to be emphasized by this statutory exception to the general provision of the statute and the rule of law, limiting the right of appeal to final decisions is this: that, as injunction orders deprive parties of the possession and control of property and business, and, in case of error, work irreparable mischief and great injustice, the party upon whom the order operates should have an early opportunity to have the record examined by the Appellate Court, and if error is discovered to have it corrected without the delay incident to litigation in its various stages before reaching final judgment.*" The italics are mine.

"As the statute in question undertakes to introduce a new feature in federal procedure, by conferring the right of appeal from certain orders and decrees before final decision, we have approached a consideration of its scope and effect with caution; and in view of the doubt which always comes from entering new fields, it is very gratifying to learn that the Circuit Court of Appeals for the Fifth Circuit has, in a similar case, adopted the same construction in a forcible opinion recently rendered by Pardee, Circuit Judge, in Jones Co. vs. Munger Co., reported 50 Fed. 785, I. C. C. A. 688."

In the case of *Columbus Watch Co. vs. Robbins*, 52 Fed. 337, 3, C. C. A., 216, which was also a patent case, the Circuit Court of Appeals for the Sixth Circuit declined to follow Richmond vs. Atwood and Jones vs. Munger, and decide the case on the merits, on an appeal from an interlocutory decree, and attempted to certify that question to

this Court, but the case was here dismissed on the ground that the question had really been decided by the Court of Appeals, and was not properly here.

S. C. 148, U. S. 266, 269.

Richmond vs. Atwood, on the rehearing, had not then been reported, as that case was not decided until September 27, 1892, and Columbus Watch Co. vs. Robbins was decided October 10th, 1892.

IN THE SEVENTH CIRCUIT.

Andrews vs. National Foundry & Pipe Works, 61 *Fed.* 782, 10 *C. C. A.* 60, was a creditors' bill filed by the National Foundry & Pipe Works against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb and others. Andrews and Whitcomb were in possession of the property as purchasers under a foreclosure. An order was entered appointing a receiver for the property of the Water Company, requiring Andrews and Whitcomb to deliver the possession of the property to the receiver, and enjoining them from interfering with the possession of the receiver.

In answer to an objection to the jurisdiction of the Court, the Court, through Judge Woods, uses the following language, p. 789: "The objection is made that the statute authorizes an appeal only from an 'interlocutory order' of injunction, granted upon a hearing in equity; that the order in this case was a preliminary one, made upon the prima facie showing, and is not appealable; but we concur in the opinion of the Court of Appeals for the First Circuit, that the statute was intended to extend the right of appeal 'to all that class of interlocutory orders or decrees (of injunction) which interfere with the possession of property, or operate in the restraint of

trade.' Richmond vs. Atwood, 5 U. S. App. 151; 2 C. C. A. 596; 52 Fed. 10. The order granting an injunction should be set aside and it is so ordered."

There was an application for a rehearing. Mr. Justice Harlan sitting in the Court, and Judge Woods again delivering the opinion of the Court says, p. 790: "It is not necessary to consider whether or not under the statute an appeal may be had from an order appointing a receiver. On that question see Construction Co. vs. Young, 59 Fed. 721; 8 C. C. A. 231. Dudley E. Jones Co. vs. Munger Co., 2 U. S. App. 188; 1 C. C. A. 668; 50 Fed. 785. Richmond vs. Atwood, 2 C. C. A. 596; 52 Fed. 10. Pennsylvania Co. vs. Jacksonville R. R. Co., 55 Fed. 131; 5 C. C. A. 53. American Const. Co. vs. Penn. Co , 148 U. S. 372; 13 Sup. Ct. 758.

The appointment in this case was of a receiver of the Oconto Water Company, and of that the appellant cannot complain. The wrong done them was in ordering them to surrender to the receiver the possession of the Water Works plant, of which they were in possession, claiming title under the foreclosure sale, and directing the receiver to take possession thereof, and in enjoining them against asserting title or claim to the property. These features of the order are mandatory in character and subject to review upon appeal." The italics are mine.

IN THE FIFTH CIRCUIT.

In *Pennsylvania Co. vs. Jacksonville Railway Co.*, 55 Fed., 131, 5 C. C. A., 53, the appellant filed a bill for the foreclosure of a mortgage, the American Construction Company filed an intervening petition praying that the temporary order appointing a receiver should be set aside, and all fur-

ther proceedings in the suit be stayed, and on this petition an order was made as follows, p. 135: "This cause came on to be heard on the 28th day of July, 1892, on the motion of the American Construction Company, which had intervened therein, and which is also complainant in another suit in equity against the said defendant and others, in the bill filed on the 6th day of July, 1892, praying for the appointment of a receiver. The said motion and petition of intervention of the said American Construction Company prayed for an order vacating the order entered in the above entitled cause on the 23d day of the month of July, aforesaid, appointing Robert B Cable, Esq., receiver, and staying all further proceedings in said cause. On consideration thereof, and of the said several bills in equity, and the affidavits and exhibits in support thereof, it is ordered, adjudged and decreed that the aforesaid order appointing Robert B. Cable receiver of the property of the Jacksonville, Tampa & Key West Railway Company be and the same is hereby set aside and vacated, and all further proceedings in the above entitled cause stayed until the further order of this Court." The appeal was from this order.

Objection to the jurisdiction of the Court of Appeals was made and urged on a motion to dismiss. The Court, speaking through Judge McCormick, used the following language, p. 136: "In our opinion, to order, at the prayer of one party, that all further proceedings in the cause shall be stayed until the further order of the Court, is to grant an injunction, within the meaning of the seventh section of the act of March 3d, 1891. It follows that appellee's motion to dismiss this appeal must be denied."

The Court then proceeded to consider the petition on its

merits, and reversed it, reinstated the receiver and directed the property to be restored to his possession.

This case was brought to this Court on an application for a certiorari (American Construction Co. vs. Jacksonville Ry., 148 U. S., 385), where the jurisdiction was affirmed, this Court using the following language:

"In the first of the cases now before us the appeal was clearly well taken from the order of the Circuit Court, so far, at least, as the injunction was concerned. If the Circuit Court of Appeals, on the hearing of that appeal, erred in going beyond a modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes, the error was one in the judicial determination of a case within the jurisdiction of that Court, and neither so important in its immediate effect, nor so far reaching in its consequences, as to warrant this Court in undertaking to control the cause at this stage of the proceedings."

IN THE SECOND CIRCUIT.

Florida Const. Co. vs. Young, 59 Fed., 721, 8 C. C. A., 231, was an appeal from an order appointing a receiver of appellant's property, and the order provided that the officers and agents of the Construction Company should forthwith deliver up to the receiver all of the property and books and papers of the company. The order also provided that the Construction Company, its officers and agents be enjoined and restrained from removing from the jurisdiction of the Court any of the property, books and papers of the Company, and from interfering in any way with the possession of the receiver.

The question of jurisdiction was not raised or considered. The Court, in an opinion by Judge Wallace, held that the Court of Appeals in a case of that character was limited to a consideration of the propriety of granting the injunction, and could not consider the question as to whether or not the receivers should have been appointed, on the ground that the injunction was merely subsidiary to the appointment of a receiver.

The opinion concludes as follows:

"Although it is auxiliary to the receivership, it is a remedy so merely formal in the present case, that it is difficult to conceive how it could have benefited the plaintiffs or injured the appellant. The order constituting the receivership, among other things, directed the officers and agents of the Construction Company to forthwith deliver to the receiver all of the property of the company in their possession; and, for a refusal to comply, they would be punishable by process of contempt as effectually as they could be under the injunction, if, in violation of its terms, they should remove the property beyond the jurisdiction of the Court. The appointment of a receiver is a remedy somewhat more stringent than an injunction, re-training a party whose property is subjected to a receivership from removing it from beyond the jurisdiction of the Court. R. R. Co. vs. Sloan, 31 Ohio St., 1. In the case of Skip vs. Harwood, 3 Atk., 564, where the defendant was present in court during the hearing on a bill for an accounting, and, in consequence, knew of the decision appointing a receiver, he was adjudged to be in contempt for removing a portion of the assets before the decree was drawn.

The injunction in the present case may have been un-

necessary, but it is hardly open to argument, that if the case presented to the Circuit Court justified the appointment of a receiver, it could not have been an improper exercise of discretion on the part of the Court to enjoin the officers and agents of the Construction Company from doing any acts which might tend to render the receivership ineffectual. The order should therefore be affirmed."

IN THE SIXTH CIRCUIT.

In *Bissell Company vs. Goshen Company*, 72 Fed., 545, 553, 554; 19 C. C. A., 25, Judge Lurton, delivering the opinion of the Court of Appeals for the Sixth Circuit, and speaking of the seventh section of the Act of 1891, uses the following language;

"This section and the amendment thereof, being intended to provide a remedy for an evil widely recognized, are entitled to a favorable construction, advancing the right as far as consistent with the words of the statute. Platt vs. R. R. Co., 99 U. S., 48; Heydenfeldt vs. Min. Co., 93, U. S., 638. The enlargement of the right of appeal so as to embrace the class of interlocutory decrees mentioned in the statute, was in accord with the well known usages and practice of English courts of equity in granting appeals from interlocutory decrees, and of such Chancery Courts in States of the Union as had not by statute limited appeals to those strictly final.

"The narrowness of the rule limiting appeals to technical final decrees, and the contrast with the well known English rule, was recognized by the Supreme Court in Forgay vs. Conrad, 6 How., 205, where the Court said:

"In limiting the right of appeal to final decrees, it was

obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. In this respect the practice of the United States Chancery Courts differs from the English practice, for appeals to the House of Lords may be taken from an interlocutory order of the Chancellor, which decides a right of property in dispute * * * and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees."

"It is proper, therefore, to assume that when Congress undertook to enlarge the right of appeal, it did so in the full light of the history of appeals in equity causes, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees. What the Congress meant by an interlocutory decree, granting or continuing an injunction, is to be ascertained by interpreting the technical terms used in the Act according to their usual significance in courts proceeding according to the well known principles, rules and usages of courts of equity."

And then after pointing out the distinction between an interlocutory order and an interlocutory decree, he proceeds as follows:

"We may assume, that in using the language 'interlocutory order or decree,' Congress had regard to the distinction between an interlocutory order and an interlocutory decree, and intended by allowing an appeal from an interlocutory order, granting or continuing an injunction, to describe those preliminary orders granting an injunction upon a hearing on

affidavit, involving no determination of the merits, being allowed at the discretion of the Chancellor upon a balancing of inconveniences." P. 554.

IN THE SEVENTH CIRCUIT.

In *Lake Street Railroad vs. Farmers Loan and Trust Co.*, 77 Fed. 769, 23 C. C. A., 448, the suit had been begun in the State Court, and while there, an injunction had been granted, which, after removal, was dissolved, and from the order of dissolution, the appeal was taken. It was insisted that the question of jurisdiction was not open in the Court of Appeals, but that court was limited to a consideration of the order appealed from.

In a learned opinion by Judge Woods, the court construing section 7 of the act of 1891, and the amendatory acts of Feb. 18, 1895, denied this contention and thus referred to their own previous rulings and the decision in the second circuit, p. 791: "In Construction Company vs. Young, 11 U. S. App. 683, 8 C. C. A. 231, and 59 Fed. 721, there was no question of jurisdiction, and the expressions quoted and relied upon, are, perhaps, not in harmony with our decision in Andrews vs. Pipe Works, supra, wherein we held that so much of an order for the appointment of a receiver as directed the surrender of the property in controversy to the receiver was appealable."

IN THE FIRST CIRCUIT.

In *Lake Nat. Bank vs. Wolfeborough Sav. Bank*, 78 Fed. 517, 24 C. C. A. 195, the Court of Appeals speaking through Judge Colt, says: "This is an appeal from an interlocutory order appointing a receiver, and granting or continuing an

injunction. The appellees (complainants below) have filed a motion to dismiss the appeal upon the ground that this court has no jurisdiction. In support of this motion, it is urged that in the assignment of errors, the appellant raises only the question of the jurisdiction of the Circuit Court, and that under the act of March 3, 1891 (26 Stat. 826), this court cannot entertain an appeal which presents solely this question." * * * *" Again, on pages 518-519:

"*The appellees further urge in support of their motion to dismiss, that the injunction was merely incidental to the receivership order, and therefore not appealable under section seven. The interlocutory order or decree ordered the defendant, its officers and agents forthwith to deliver the property held by them into the hands of the receiver, and absolutely enjoined them to refrain from interfering with the property. While the injunction order was incidental to the appointment of a receiver, it was not merely nominal, but formed a substantial part of the decree. The question whether an interlocutory injunction was erroneously or improvidently granted, is appealable to this court.*" The italics are mine.

There being some diversity of opinion among the several Circuit Courts of Appeals as to what questions were open to the Appellate Court, on an appeal from an interlocutory order, the question was brought to this court at the last term, in *Smith vs. Vulcan Iron Works*, 165 U. S., 518, and this court in an opinion by Mr. Justice Gray says, page 525:

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in the courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which through-

out the progress of the cause, might seriously affect his interests but also to save both parties from the expense of further litigation should the appellate court be of opinion that the plaintiff was not entitled to an injunction, because his bill had no equity to support it."

In the opinion in Smith vs. Vulcan Iron Works, the case of Florida Construction Co. vs. Young, supra, is cited as sustaining the view that on an appeal from an order granting a preliminary injunction, the appellate court will consider the merits, but a careful consideration of that case will, I think, disclose the fact that the court there limited the rule to cases where the injunction is the main relief sought, and this last case was principally relied on in the Circuit Court of Appeals to sustain the contention of the appellee, but is not in harmony with the other cases I have cited, nor in my opinion, with the reasoning of this court in Smith vs. Vulcan Iron Works.

The question presented is one of vital importance to suitors and is entitled to the most serious consideration. The argument that was made which induced the courts to adopt the rule of construction which has been affirmed in Smith vs. Vulcan Iron Works, in patent cases, applies with even greater force to cases like the one at bar.

III.

Where the Order Appointing the Receiver is Accompanied by an Order Requiring the Surrender of Property or Restraining Interference with it, it has been Held Appealable.

1. While it may be conceded that it is no where expressly decided that an order appointing a receiver is of itself an injunction within the meaning of the section, the question here presented has been directly answered in the affirmative by the Circuit Court of Appeals for the Seventh Circuit in *Andrews vs. National Foundry & Pipe Works*, and by the Circuit Court of Appeals for the First Circuit in *Lake Nat. Bank vs. Wolfeborough Sav. Bank*, cited supra, where the order appointing the receiver, also required, as in this case, the surrender of the property.

2. The logic of the decisions seems to establish clearly that an order appointing a receiver is an injunction of itself, and there is a right of appeal.

The mischief to be remedied was two-fold, first, to give parties who had been summarily deprived of their property the right to have these orders promptly reviewed; and second, to secure the speedy determination of their causes on the merits. The first proposition was the foundation of the decision of the earliest case, *Dudley E. Jones Co. vs. Munger Co.*, supra, where the Circuit Court of Appeals in the forcible opinion delivered by Judge Pardee, first declared the purpose of Congress to give parties who had been *deprived of the possession of their property by an interlocutory order or decree the right to have the order reviewed.*

This construction was amplified by the Circuit Court of

Appeals for the First Circuit, in *Richmond vs. Atwood*, as was said by this Court in Smith vs. Vulcan Iron Works, "after thorough discussion of the subject on principle and authority."

Again, the Circuit Court of Appeals for the Fifth Circuit, in *Penn. Co. vs. Jacksonville Ry. Co.*, governed by the same controlling principle, held that an order staying a cause was an injunction within the meaning of the statute, and this ruling is expressly affirmed by this Court in Am. Const. Co. vs. Jacksonville Ry., though there is a query as to how far the Court of Appeals should have gone, which has since been settled by Smith vs. Vulcan Iron Works.

The Circuit Court of Appeals for the Seventh Circuit in *Andrews vs. National Foundry & Pipe Works*, affirming the cases previously cited, declares this paramount purpose of Congress, and sustained an appeal from an interlocutory order granting a subsidiary or ancillary injunction, and decided the case on its merits.

We are not left in doubt as to what the Court intended by this decision, for in the later case of *Lake Street R. R. vs. Farmer's Loan & Trust Company*, the same Court declares in an opinion by the same learned Judge, that in that case, they "*held that so much of an order for the appointment of a receiver as directed the surrender of the property in controversy to the receiver was appealable.*" The italics are mine.

The Circuit Court of Appeals for the Sixth Circuit, in the learned and exhaustive opinion by Judge Lurton, from which I have quoted, declares that this section and amendment are "entitled to a favorable construction advancing the right as far as may be consistent with the words of the statute." That learned Court, in terms approves the decisions in Jones vs. Munger, Richmond vs. Atwood, Penn. Co. vs.

Jacksonville Ry. and Andrews vs. National Foundry & Pipe Works.

The Circuit Court of Appeals for the First Circuit, in *Lake National Bank vs. Wolfeborough Sav. Bank* declared that an order which required the defendant and its officers to deliver the property to the receiver, and enjoined them from interfering with the property was appealable.

No case has been cited by opposing counsel which militates against these views, except Florida Construction Co. vs. Young.

The case of *Florida Construction Co. vs. Young* relied on by opposing counsel, while denying the right of an appeal from an order appointing a receiver, does not deny the right of appeal from an interlocutory order granting an injunction, even though it be subsidiary or auxiliary to the appointment of a receiver, and merely declares that the Court is limited to a consideration of the propriety of the injunction order.

This construction of the act of Congress seems to me to be clearly in conflict with the decisions of the several Circuit Courts of Appeal, and the decision of this Court in *Smith vs. Vulcan Iron Works*, as announced in the opinion delivered by Mr. Justice Gray, that it was not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which would be injurious to him, but to give him an opportunity to test the equity of the bill.

Guided by these rules and decisions, I respectfully assert the following propositions:

I.

Every order appointing a receiver which, like this, involves the taking of property from a party, necessarily implies, and is the equivalent of an injunction.

II.

An order, in connection with an order appointing a receiver, which requires the defendant to deliver property in his possession to the receiver is an injunction.

III.

If either of these propositions is sound, the order appealed from in this case was appealable under the provisions of Section 7, of the Act of March 3, 1891, as amended by the Act of February 18, 1895.

FIRST.

The statute authorizes an appeal "when upon a hearing in equity, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree." The words "upon a hearing in equity" have been held to cover a preliminary injunction. The words "order or decree," as I have shown, have been held to cover every and any order which grants or continues an injunction, or operates to restrain a party.

And the cases cited show that without exception, the Circuit Courts of Appeals hold, that where there is an order, which in terms restrains a party from interfering with the property over which a receiver is appointed, an appeal lies. Two of these courts have held that an appeal lies from the order if it requires the defendant to deliver the property to the receiver, and one has held, with the approval of this Court, that an order staying proceedings in a cause is an injunction. Did Congress intend that only orders which in terms restrain a *party* should be treated as orders granting injunctions, or was it intended that parties should have relief where the necessary effect of the order was to restrain.

If the necessary effect of an order is to restrain a party and subject him to penalties for contempt, is it any the less an injunction than it would be, if it restrained the party in terms? I submit it is the substance which must be considered, and the mischief which is to be remedied is the controlling influence. It can make no difference whether the order be called a restraining order, a stay of proceedings, or by any other name, if it operates to deprive parties of the possession and control of property and business, or compels enforced action in the use of property pending the litigation, or, if, in the words of Judge Aldrich, it belongs "to that class of interlocutory orders or decrees which interfere with the possession of property or operate in the restraint of a party's business * * * the party upon whom the order operates should have an early opportunity to have the record examined by the appellate court."

The mischief was, that by interlocutory orders of the court, the parties were deprived of the use, control, and possession of their property indefinitely, and the purpose was to afford the injured party a speedy remedy.

A majority of the cases cited were patent cases, but the reasons which induced the courts to construe the statute, in cases of that class, will apply with even greater force to cases of the character of the one at bar. In the patent case, the party is only prevented by the "interlocutory order or decree" from using his property pending the appeal; while in the case at bar, the defendant, by an interlocutory order, is absolutely deprived of the possession and control of its property, and the liberal construction given to the statute is to be reversed, and this order, which has all the characteristics of an injunction, both in its scope and effect, and which is mani-

festly within the mischief intended to be remedied by the statute, is to be held not to be an injunction within its terms, because, it is said, it is not the main relief sought by the bill.

The numerous illustrations of the hardships which arose by reason of injunctions in patent cases could be more than duplicated in cases of receiverships with incidental, or subsidiary, or implied injunctions, whether mandatory or prohibitory in their character. The case at bar seems to be a sufficiently glaring illustration, and I shall content myself with a reference to two recent cases.

Shields vs. Coleman, 157 U. S. 168.

Clark vs. Central R. R. of Georgia, 50 Fed. 338.

In the former case, as is well known, a receivership was vacated after the entire property had been sold and the receiver discharged, and in the latter, a great railroad system was practically destroyed by an *ex parte* appointment of a receiver.

If the construction of Section 7, as I submit is declared in the cases cited is sound, then the word "injunction" will be construed to cover every interlocutory order depriving a party of the possession or control of his property, "for such a construction is required to render the remedy effectual. For we must always construe an act so as to suppress the mischief and advance the remedy." Lyde vs. Barnard, supra.

If the intention of the law maker is to be ascertained by the rules of construction affirmed and declared by the authorities, and by none more forcibly than this learned tribunal, the question might be submitted on principle with confidence. But in view of the decisions of several of the Circuit Courts of Appeals, with but one discordant note, and the latest declara-

tion of this court, it seems to me that the affimative answer to the question certified is fully warranted by authority.

In Evans vs. Coventry, 3 Drew., 82, the learned Vice Chancellor says: "Having prayed * * that a receiver shall be appointed until a winding up shall take place, the sixth paragraph of the prayer is for an injunction to restrain the defendants from getting in any of the assets of the concern. That is connected in fact with the appointment of a receiver and I may observe with respect to that, that of course the appointment of a receiver (if a receiver were appointed) would of itself operate as an injunction; and it would not be necessary, if a receiver were appointed to go and grant an injunction in terms."

The learned court in *Florida Construction Co. vs. Young*, supra, have, while denying the right of appeal fro n an order appointing a receiver, in effect declared such an order to be the equivalent of an injunction. "The appointment of a receiver is a remedy somewhat more stringent than and injunction restraining the party whose property is subject to a receivership from removing it beyond the jurisdiction of the court. Railroad Co. vs. Sloan, 31 Ohio St. 1." The court then refers to Skip vs. Harwood, 3 Atk. 564, were a party who was present and knew of the decision appointing a receiver, removed a part of the assets before the decree was drawn, and was held guilty of contempt.

Can it be true that the greater the mischief, the more injurious it is to the defendant, the less his remedy is? That because the order does not say in terms that it is an injunction, or does not in terms restrain the defendant, that it may have all, and even more, force and effect than an injunction

so far as it may affect the defendant injuriously, and yet he be deprived of his appeal?

On what principle could the party in Skip vs. Harwood be punished for a contempt, except, on the ground of an implied injunction in the order?

A court may by an order restrain a party from interering with property, and punish him for contempt for a violation of the order, and this is an injunction, but if the party is by the order of the court required to surrender his property to an officer named by the court and is punishable for contempt for his failure to comply, this is not an injunction. This is the proposition which the appellee must sustain to defeat the right of appeal.

Viewed in the light of its effect upon the defendant corporation, the order in the case at bar is the most sweeping character of injunction.

It suspends the right of action by the corporation.

In Thompson on Corporations the learned author says: "The necessary effect of the appointment of a receiver, unless the statute under which he is appointed is restrictive, is to suspend all rights of action, of whatever description, on the part of the corporation, since the receiver, in a general receivership, whether it be what is called a receivership *pendente lite*, or a receivership for the purpose of winding up the corporation, is vested with the right to the custody of all the assets of the corporation of whatever description, for the purposes of the administration; and this necessarily includes every right of action of whatever description, which is possessed by the corporation."

5 Thompson on Corp., §6900.

It is elementary that the appointment of a receiver of a

court of competent jurisdiction and taking possession operates as an injunction, not only on the parties to the action, but upon all parties and courts, and no one can interfere with the subject of the receivership.

5 Thompson on Corp., §6898.

Mr High, in his work on Receivers, says (High on Receivers, §15-16):

"The relief granted by courts of equity in the appointment of receivers *pendente lite* bears in many respects a close analogy to that by preliminary injunction. Some points of resemblance in the two forms of remedy have been already indicated, while others will frequently appear throughout the following pages. Both are extraordinary equitable remedies, as distinguished from the usual and ordinary modes of administering relief either in courts of law or of equity. Both are essentially preventive in their nature, being properly used only for the prevention of future injury, rather than for the redress of past grievances. Both, too, have one common object in so far as they seek to preserve the *res* or subject matter of the litigation unimpaired, to be disposed of in accordance with the future decree or order of the court. Perhaps the principal element of difference between these two important remedies lies in this: that an injunction is strictly a conservative remedy, merely restraining action, and preserving matters in *statu quo*, without affecting the possession of the property or fund in controversy; while the appointment of a receiver is usually a more active remedy, since it changes the possession as well as the subsequent control and management of the property. A court of equity by an injunction ties up the hands of the defendants, and preserves unchanged, not only the property itself, but the relation of

all parties thereto. But in appointing a receiver, the court goes still further, since it wrests the possession from the defendant, and assumes and maintains the entire management and control of the property or fund, frequently changing its form, and retaining possession through its officer, the receiver, until the rights of all parties in interest are satisfactorily determined."

"§16. From points of resemblance already indicated between these two extraordinary equitable remedies, it is not to be inferred that the appointment of a receiver necessarily follows from the granting of an injunction, or that the two remedies are necessarily inseparable. And while it frequently happens that courts are called upon to administer both species of relief in the same action at one and the same time, yet it by no means follows that because an injunction is granted a receiver must be appointed, and the two are to be treated as distinct and independent matters. A court of equity may therefore refuse a receiver, although the case presented is a fitting one for an injunction, and although an injunction has already been granted. It has been held, however, that the power of appointing a receiver, when the relief is necessary for the collection and preservation of property, pending an injunction suit, is a necessary incident to the power of granting an injunction; and if the latter power be expressly conferred by law upon a judge in vacation, the former may be regarded as conferred by implication."

SECOND.

The order made by the Circuit Court contains an injunction when tested by any fair rule of construction.

I quote from the order: "And the said Highland

and Belt Railroad Company and each and every of its officers, directors, agents and employes are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control."

Record p. 22.

It is an order to the defendants to do a particular act, which comes within the definition of the lexicographers.

Century Dictionary, Injunction.

And this accords with the definition of the text writers.

"A writ of injunction may be defined as a judicial process operating *in personam*, and requiring the person to whom it is directed, to do, or refrain from doing a particular thing."

1 High on Injunction, §1.

Judge Story defines it as "A judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.

2 Story Eq. Jur. §871.

It is an injunction under the rule laid down in *Richmond vs. Atwood;* it is declared in terms to be an injunction in *Andrews vs. National Foundry and Pipe Works*, and in *Lake National Bank vs. Wolfeborough Savings Bank.*

Surely it may be urged with great force in the construction of a remedial statute, that these learned courts having understood and construed this word according to its general acceptation, that this was what the law makers intended.

No authority has been cited controverting this construction and definition, except *Florida Construction Company vs. Young*, to which I have heretofore directed the attention of the court.

THIRD.

If I have succeeded in convincing your Honors on either of the two propositions, then I respectfully submit that I have established the third, and the question submitted by the learned Circuit Court of Appeals must be answered in the affirmative.

Respectfully submitted,

ALEX. T. LONDON,
Attorney for Appellant.

SAM'L A. PUTMAN,
Of Counsel.

No. 427.

Brief of Hotchkiss for Appellee

Filed Nov. 26, 1897

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In the Supreme Court of the United States.

October Term, 1897.

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Statement of Facts.

Appellee adopts the statement of facts presented by Appellant from the record, except that attorney for Appellant says on page 8, line 6, that—

"It is to be noticed, however, that the bill nowhere

charges that the complainant acted upon or was deceived by any of the representations of the Defendants."

This is not true. The bill, as amended, expressly states that but for the representations made by the respondent, the Complainant would not have entered into the contract, and that the representations made and on which Complainant relied were the special inducements to the contract, but Appellant's counsel, in making this stricture, travelled beyond the question certified to this Court.

Continuing the above quotation, where left off, on line 6—

"Nor that the Complainants accepted or availed itself of its option to purchase the properties of the Belt Railroad within the time prescribed in the agreement or since."

Another instance in which counsel departs from the question certified. The bill, as amended, alleges that the contract was ultra vires of the charters of each contracting corporation. Any attempt therefore on its part to have done so would have been absurd and unavailing, as neither could proceed any further.

Act to be Construed.

Section 7 of the Act of Congress approved March 3rd, 1891, as amended February 18th, 1895, is as follows, the original statute being omitted :—

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be

refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, to the Circuit Court of Appeals: PROVIDED, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the Court below shall not be stayed, unless otherwise ordered by that Court during the pendency of such appeal; and provided further, That the Court below may in its discretion require as a condition of the appeal an additional injunction bond."

Argument.

We are invited to a consideration of the statute touching appeals from interlocutory orders in injunction cases under the 7th Section of the Act as amended creating the Circuit Court of Appeals, by the certification to this Court by the Circuit Court of Appeals for the Fifth Circuit, of the question whether the order appointing Phillip Campbell receiver in this case is appealable under the above statute, on the ground that the order appointing him was the equivalent of an injunction or embraced within its terms an injunction.

There is no lack of pilots, but the currents of judicial thought have been so variable that the course of the law has not been clearly defined. In view of the difficulties

acknowledged by the learned Circuit Court of Appeals for the Fifth Circuit, as vexing the question, we can but hope to digest the authorities bearing upon the question certified in such order and method as that they may take light one from another, though they may take none from us.

The question certified may be resolved:

1. Is an order appointing a receiver susceptible of an appeal by reason of the implied injunction necessarily contained in any such order.

2. Is the order in this particular case susceptible of an appeal, either by reason of the implied injunction contained therein, or by reason of the expression therein of what would otherwise have been implied.

Appellant's brief is a most potent *argumentum ab inconvenienti* of the affirmative of this resolution of the question certified.

Appellant's counsel has arranged his argument under three heads, in the first of which he proposes that "Acts extending the right of appeal should be liberally construed," in the second that "The Statute (this one allowing appeals in injunction cases under Section 7 of the act above referred to) has been uniformly held remedial, and the greatest liberality has been shown in its construction to advance the remedy," and in the third: "Where the order appointing the receiver is accompanied by an order requiring the surrender of property, and restraining interference with it, it has been held appealable."

Attorneys for Appellee go further than the Attorney for Appellant is inclined to go on page 38 of his brief, Proposition one, and say that if the order complained of be an injunction, such order is necessarily included in every

order appointing a receiver, from which order of appointment no appeal lies under the statutes.

Forgay vs. Conrad, 6 Howard, 201 ;
Grant vs. Insurance Co., 106 U. S., 429; 1 Sup. Ct., 414.
Construction Co. vs. Young, 8 C. C. A., 231.

It may be conceded that an order appointing a receiver is in some cases more far reaching in effect than an interlocutory order for an injunction.

The line of demarkation between a restraining order in fact, from which an appeal lies, and an order appointing a receiver, from which no right of appeal is given, must be drawn in this case.

Should the order in this case appointing Phillip Campbell receiver be held to embrace within itself by implication or otherwise, an injunction, then it must follow that an appeal under the statute will lie from every EFFECTUAL order appointing a receiver; and for that matter, from every interlocutory order the Circuit Court may make in any case.

The order appointing a receiver necessarily carries with it the right of the receiver, the Court's officer, to the possession of the property, for otherwise the order would be ineffectual; and to say that a Court, having ordered that a receiver be appointed over property, cannot in the same order require a delivery of possession to its officers, would be to emasculate its order of appointment.

His first proposition is too broad, and it must be qualified, that if the statute giving the appeal

creates a *new jurisdiction* it is to be strictly construed,

> Endlich on Interpretation of Statutes, Section 155.
> Pittman vs. Flint, 10th Pickering 506,

and in and by this statute a new court with entirely new powers and jurisdiction was created, and no case could more clearly demonstrate the necessity for a narrow and strict construction than the case at bar, else will appeals lie in cases in which appeals have never been allowed, and in cases which in terms are not mentioned in the statute; to-wit: upon writs of *ni exiat regno and orders appointing receivers*, though even by the rule of liberal construction contended for by appellant, appeals would not lie in cases where they are refused; though it is submitted that as great injury might result from the refusal to appoint one, as in appointing one, and the contention of appellant is therefore one sided. The mischief may lie as much in the discretion of the Judge in refusing to appoint a receiver, the words GRANTING and REFUSING being the words of the statute, and if this statute must be construed to suppress the mischief, it may be pertinently asked, which mischief? If the mortgagor is destroying the mortgagee's security, the mortgagee is acknowledgedly entitled to a receiver, and if the Judge refuses the prayer for one, the mortgagee is helpless and the mischief continues, unless this Court is expected to go to the length that a refusal to appoint a receiver is such a refusal to grant the injunction necessarily implied in the appointment of a receiver that an appeal will lie under the statute.

Liberality of construction must not lead to an absurdity. A liberal construction it is thus shown, may be liberal

on one side only, the other remaining quite narrow and deformed.

The liberality of construction for which appellant contends in his second proposition (and to which appellee accedes) is that upon appeal in cases coming *within the statute*, the consideration of the Appellate Court shall not be so narrow as that it shall confine itself to the mere question of the propriety of the injunction as in the patent cases cited by appellant, but shall go further, and if possible dispose of the whole matter putting an end to the injunction and the litigation, when the entire record is before Court and the question to be decided is not one of fact, as in the case at bar; that ex-parte proceedings when on motion and notice, are within the spirit of the statute, the same being "hearings in equity."

Dudley Jones vs. Munger etc., Mfg. Co,, 1 C. C. A., 158.
Richmond vs. Atwood, 2 C. C. A., 596.
Smith vs. Vulcan Iron Works, 165 U. S. 518.

Certainly the widest liberality of construction has been given to the statute in the cases cited without going to the absurd, one sided length for which appellant contends. In fact a more liberal statute in terms is sometimes narrowed when the liberality of spirit of the statute nevertheless leads to an absurdity; as, if a statute enact that a man may try ALL cases arising within his manor, it has been held not to apply to cases wherein he is a party.

8th Reporter 118.

In respect to his third proposition on page 36 of his

brief he says: "Where the order appointing the Receiver is accompanied by an order requiring the surrender of property, or restraining interference with it, it has been held appealable," and he cites cases which we will take up in the order in which he discusses them.

Andrews vs. National Foundry & Pipe Works, 10 C. C. A. 60. In this case the Court in the decision on the rehearing says: "*The wrong done them was in ordering them to surrender to the receiver the possession of the water works plant of which they were in possession claiming title under the foreclosure sale, in directing the receiver to take possession thereof, and in enjoining them from asserting title or claim to the property.*"

This was an order to a party over whose property the receiver was not appointed to deliver property of which he had control as the owner thereof NOT AS AN OFFICER, AGENT OR SERVANT OF THE OCONTO WATER CO. there is no mere equivalent of the injunction implied in the order appointing the receiver, directed to the corporation, its servants, officers, agents and directors to deliver the property of the defendant as to whose property the receiver was appointed, to that receiver, but an order to a third party not only to deliver property, but EXPRESSLY RESTRAINING THEM AGAINST ASSERTING CLAIM OR TITLE TO THE PROPERTY. The same injunction as to the delivery of the property addressed to the corporation of whose property the receiver was appointed would have been merely formal, and not appealable.

The logic of this decision is rather that a mere formal

injunction in cases appointing receivers can not be tortured into an injunction which will support an appeal. Otherwise appeals would lie in all cases appointing receivers which is not within the terms of any statute allowing appeals from interlocutory orders.

The case of *Dudley E. Jones Co. vs. Munger etc. Mfg. Co.*, 1 C. C. A., 158, was a case wherein an injunction only was granted, there being in the case no suggestion of a receivership.

The same observation will apply to the case of *Richmond vs. Atwood*, 2 C. C. A., 596.

Appellant has cited authority to show that an order of the Court made, staying proceedings in a cause until further orders of the Court is an injunction within the meaning of the statute allowing appeals in injunction cases. *Pennsylvania Co. vs Jacksonville T. & K. Ry. Co.*, 5 C. C. A., 53; but was this order in that case A MERE INCIDENT TO THE ORDER APPOINTING THE RECEIVER, or was it in any manner whatsoever NECESSARILY IMPLIED IN THE ORDER APPOINTING THE RECEIVER? Not in anywise, the citation is foreign to the question certified. The order in that case was entirely distinct from the order appointing the receiver, in no manner a part of or incident to the order appointing the receiver.

Bissell Company vs. Goshen, 19 *C. C. A.* 25, is a case not involving in any manner the appointment of a receiver, whereas the case at bar must be confined to injunctions necessarily implied, or if expressed going no further than the implied injunction included in an order appointing a receiver. This case throws no light on the question under consideration.

Lake Street Railroad vs. Farmers Loan & Trust Co., 23 *C. C. A.* 448, falls within the observations made to the case last above cited, except in passing to note that in this case the Court says that an injunction is granted ONLY ON A PRAYER THEREFOR, and it is to be noted in the case at bar, that the order was granted upon a petition WHICH DID NOT PRAY AN INJUNCTION AT ALL—p. 21 of the Record paragraph 3, which reads as follows: "Wherefore petitioner prays that a receiver may be appointed forthwith to take charge of such properties under a decree of your honor's Court."

Lake National Bank vs. Wolfeborough Sav. Bank, 24 *C. C. A.* 195, is a case wherein a receiver was appointed, and in the order the defendants, its officers and agents were ordered to deliver the property held by them into the hands of the receiver, but the order did not stop with this but went further and ABSOLUTELY ENJOINED THEM [in terms] TO REFRAIN FROM INTERFERING WITH THE PROPERTY—and this express injunction was held

to be a substantial part of the decree. The Court in this case under consideration referred to an earlier decision of its own, *Potter vs. Beal*, 2 *C. C. A.*, *p* 60, in which it said: "*But it may be doubted whether we can be given jurisdiction by an injunction entered under color for that purpose, or by one purely nominal, concurrent with proceedings before a master, or the appointment of a receiver, on the impounding of papers or moneys pending litigation, if as effectual without the injunction as with it,*" and remarked in the Lake Nat. Bank case that the ruling therein was not in conflict with its decision in the case of Potter vs. Beal, and it will be noted that in the case of Lake National Bank vs Wolfeborough Saving Bank, the order went further than a purely nominal injunction, concurrent with the appointment of a receiver, and formally ENJOINED THE DEFENDANTS, ITS OFFICERS AND AGENTS TO REFRAIN FROM INTERFERING WITH THE PROPERTY.

It is but too clear that this is likewise the view of the attorney for appellant, for on page 42 of his brief at the bottom he asks: that because the order does not say in terms THAT IT IS AN INJUNCTION, or does not IN TERMS RESTRAIN DEFENDANTS, that it may have all, and even more force than an injunction [so nominated in the order, and restraining in terms] so far as it may effect the defendants injuriously, if the defendant is to be deprived of his appeal. Clearly the necessity for an injunction so nominated in the order, and restraining in terms is appellant's own view of the case, and is in accord with the honorable Circuit Court of Appeals for the First Circuit in the two cases above arrayed.

The case of *Smith vs. Vulcan Iron Works*, 165 *U. S.*, 518, is as foreign to the question under consideration as Newton's *Bionomial Theorem*, and the discussion of the case as immaterial as the striking of the town clock, for in that case there was no suggestion of a receivership, but an injunction coming within the statute, was prayed for and granted, and all that the Court decided was that under such circumstances the equity of the bill would be considered on appeal.

In the case of the *Florida Construction Co. vs. Young*, 8 *C. C. A.*, 231, the court inferentially holds that the formal order restraining the defendant, its officers, agents, etc., from interfering is not more than is necessarily included in the order appointing the receiver, from which no appeal is given. *In that case there was a restraining order in fact; in the case at bar there is not such an order.*

Appellant lays great stress upon the injury done in cases of receiverships, and seeks to justify a tortuous interpretation of the statute allowing appeals in cases of injunctions so that appeals may be extended to cases of receiverships through the alleged injunctions inherent in the orders appointing receivers, but it should not lie in the mouth of any one to impute wrong or injury through the custody of his property *by the court.*

In receiverships the whole business is not stopped as in injunctions, but under the direction and control of the court, through an impartial officer who is the representative of all parties concerned, the business is continued and the property conserved. An injunction against the further

operation of a railroad or a plant might do great harm, but the appointment of an impartial officer of the court to continue the operation of affairs, it is submitted, cannot be impugned without, at the same time, making serious imputations against the honesty and judgment of the court.

On the 6th day of March, 1897, appellee filed its petition for the appointment of a Receiver of the Highland Avenue & Belt Railroad Company, which petition is found on pages 19-21 of the Transcript.

The prayer of this petition (page 21) was that a Receiver should be appointed to take charge of the properties of the appellant. No injunction was asked for, but the appellant contends that that portion of the order of the Honorable John Bruce, Judge, appointing Phillip Campbell, Receiver, on April 5, 1897, (see pages 21-23 of the Transcript) in words as follows, to-wit: "And the said Highland Avenue & Belt Railroad Company and each and every of its officers, directors, agents and employes, are hereby required and commanded forthwith to turn over and deliver to such Receiver or his duly constituted representative, any notes, accounts, money or other property in his or their hands or under his or their control," is a "*mandatory*" injunction from which an appeal will lie under Section Seven as amended, of the Act of Congress creating the Circuit Court of Appeals.

This is not an order for an injunction, not even, as claimed, a *mandatory* injunction. The order and its effect must be construed by the petition and application then before the Court. The petition did not pray for an injunction,

nor was one necessary to the relief prayed for. (Page 21, Transcript.)

The remark of the learned Judge in granting the appeal (Judge Boarman) that the appointment of a Receiver implied an injunction, if its effect was to take property from the possession of one party and deliver it to another, might possibly be true if that was the effect, but it is insisted that the appointment of a Receiver takes the possession of the property *to the Court*, whose servant the Receiver is, and does not deliver it *to another party*; and that possession is still as much the possession of the *respondent* as of the *complainant*, and is for the conservation of the property for the benefit of all concerned.

High on Receivers, Section 134 and 739.

To say that an order appointing a Receiver carries with it an order for an injunction, is only true in the same sense as it may be that such order carries with it an order for a writ of possession or a proceeding for contempt. An injunction, mandatory or otherwise, is not the method by which a Court of Equity secures to itself the control of property or the possession thereof. If the parties refuse to recognize the right of the Receiver to have possession, the Court proceeds through its marshal to take it. Should the marshal be interfered with, the remedy is a proceeding for contempt.

The learned Judge, in making the order appealed from, seems to have followed the very form laid down in Daniel and in Curtis for use in cases where a Receiver is appointed and no injunction issued. If this order is appealable from,

then it follows that every *effectual order appointing a Receiver* is appealable from, and the Court of Appeals is exercising appellate jurisdiction in cases over which Congress has not given jurisdiction. However liberal the construction this Court may give to the said Section Seven, it certainly will not legislate to the Circuit Court of Appeals' jurisdiction. If such is to be its construction of this section, by permitting that Court to entertain this appeal, it will find itself embarrassed by appeals from interlocutory orders, which, by the act, are given preference to the prejudice of substantial appeals on the merits.

This not a mandatory injunction any more than would be an order by the Court upon a party to the record to bring into the Court files abstracted or papers wrongfully withheld, or an order overruling a demurrer whereupon the demurrant is required to plead over or answer.

The cases mentioned in the text books illustrative of a mandatory injunction are where title has passed by final decree from defendant to complainant, and the former refuses to deliver possession; in which case, the Court issues its mandatory writ to take possession from the defendant and deliver to complainant.

The text books and reports will be searched in vain for such a thing as a mandatory injunction as a preliminary writ or as a mode of enforcing an order given to a receiver to take possession of property. It has been decided by one of the best Circuit Judges, the predecessor of Judge Pardee, Judge W. B. Woods, in *McCauley vs. Kellogg*, *reported in 2d Wood*, 13, that a mandatory injunction would be granted *only on final hearing and then only to execute the decree.*

The fact is no injunction has been granted, mandatory

or otherwise. The portion of the order sought to be construed as a mandatory injunction is in reality only a *writ of possession.* The Court will aid its receiver in obtaining possession of the property subject to the receivership.

Beach on Receivers, Alderson's Edition, Section 224, says: "*Accordingly where the defendant over whose property a receiver is appointed, is in possession of real property as his own, the Court will, a proper application being made, grant an order directing him to deliver possession of it to the receiver: and this is the only proper course to pursue.*"

See also

High on Receivers, Section 144.
Griffith vs. Griffith, 2 Ves., 400.
Green vs. Green, 2 Sim., 430.

Conclusion.

Appellant's propositions are too broad. His first proposition is:

"Every order appointing a receiver which, like this, involves the taking of property from a party, necessarily implies, and is the equivalent of an injunction." The decision cited by him, *Andrews vs. National Foundry & Pipe Works, supra,* will clearly demonstrate the too great breadth of his first proposition. That was a case which INVOLVED THE TAKING OF PROPERTY FROM A PARTY, and it was properly held not to be a mere equivalent of an injunction or an implied one, but a veritable injunction, for, though it INVOLVED THE TAKING OF

PROPERTY FROM A PARTY, it took the wrong property from the wrong party.

Correctly stated his proposition would be: "Every order appointing a receiver which, like this, involves the taking of (THE) property (the subject matter of the receivership) from (the) party (defendant over whose property the receiver is appointed, being in possession thereof) necessarily implies, and is the equivalent of an injunction."

If even this more restrictive proposition, which comes more nearly within the circumstances of the case at bar be sound, and if mere implication and equivalence will satisfy the statute allowing appeals in injunction cases; then every order appointing a receiver of property in the possession of the defendant of which property the receiver is appointed, will support an appeal, even though there is no statute allowing appeals from orders appointing receivers; nevertheless, as the injunction would be implied an appeal would lie on the ground of the implied and included injunction.

His second proposition, that: "An order, in connection with an order appointing a receiver, which requires the defendant to deliver property in his possession to the receiver, is an injunction" is stated too broadly, even if the property to be delivered is the subject matter of the suit and identical with that over which the receiver is appointed, the order is no injunction, otherwise if it takes jurisdiction over property not that of the defendant, as in *Andrews vs. National Foundry & Pipe Works, supra.* In that case the Receivership was of the property &c., of the Oconto Water Company, and Andrews was enjoined to deliver property in his pos-

session to the receiver of the Oconto Co., this was properly enough held to be an injunction clearly within the terms of the statute on appeals in such cases, but that portion of the same mandatory order which was addressed or directed to the Oconto Company was held to be not within the terms of the statute; the PROPOSITION is too broad.

But this were *verborum minutiis rerum frangit pondera.* The question certified is, "Was the decree appointing Campbell receiver above referred to, susceptible of being appealed from on the ground that said order embraced within its terms an injunction or the necessary equivalent of an injunction"? and Appellees propositions are:

First. A mere implied injunction will not satisfy the statute.

Second. If the express injunction goes no further than the injunction necessarily implied, it is of no greater dignity than the implied injunction and will not satisfy the statute.

Third. The express direction in this case to deliver certain properties is of no greater dignity than the order appointing the receiver of the same property, and as the implied will not support the appeal, the express will not.

Fourth. This Court will not hold that from every interlocutory order the Circuit Court may make, or refuse to make, an appeal will lie to the Circuit Court of Appeals.

Fifth. That the Circuit Court of Appeals cannot entertain an appeal from an order REFUSING TO APPOINT A RECEIVER, for, if such were the case, it would give rise to an indefinite extension of the statute,

resulting in endless strife and litigation. The words GRANTING or REFUSING, being the words of the statute, an appeal must lie from the order refusing to appoint, equally as from the order appointing.

May we not in conclusion propound the very pertinent inquiry: If the order appointing Phillip Campbell receiver in this case be such an order as that an appeal lies from it under section 7, what form of order can a Circuit Judge make appointing, or refusing to appoint a receiver as that no appeal will lie therefrom?

The question certified by the Honorable Circuit Court of Appeals for the Fifth Circuit must be answered in the negative in both aspects.

Respectfully submitted,

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Attorneys for Appellee.

HIGHLAND AVENUE AND BELT RAILROAD COMPANY *v.* COLUMBIAN EQUIPMENT COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 427. Submitted November 29, 1897. — Decided January 3, 1898.

An interlocutory order appointing a receiver is not appealable from the Circuit Court of the United States to the Circuit Court of Appeals, and does not become so by the incorporation into it of a direction to the defendant, his agents and employés, to turn over and deliver to the receiver the property in his or their hands.

THE facts in this case are as follows: On April 5, 1897, upon a bill duly filed by the Columbian Equipment Company, an interlocutory order was entered in the Circuit Court of the United States for the Northern District of Alabama, appointing Philip Campbell receiver of the property of the Highland Avenue and Belt Railroad Company. Such order, besides the

mere matter of appointment and a description of the property, contained the following provisions:

"The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

"And the said Highland Avenue and Belt Railroad Company and each and every of its officers, directors, agents and employés are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money or other property in his or their hands, or under his or their control.

"Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents and employés as may be required for the proper discharge of the duties of his trust.

"Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defence of any and all suits or proceedings now pending in any court against said company, the prosecution or defence of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said company.

"Said receiver is hereby required to give bond in the sum of $10,000, with personal security, or the security of some

responsible guaranty and indemnity company, satisfactory to the clerk of this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

"And the court reserves the right by orders hereinafter to be made, to direct and control the payments of all supplies, materials and other claims and in all respects to regulate and control the conduct of said receiver."

The railroad company appealed from this order to the Circuit Court of Appeals for the Fifth Circuit, which court, on June 16, 1897, certified to this court the following question: "The question upon which instructions are desired and respectfully asked is: was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction or the necessary equivalent of an injunction?"

Mr. Alexander T. London and *Mr. Samuel A. Putnam* for Highland Avenue Belt Railroad Company.

Mr. John F. Martin and *Mr. Henry D. Hotchkiss* for Columbian Equipment Company.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

Is an interlocutory order appointing a receiver appealable from the Circuit Court to the Circuit Court of Appeals? And if such an order, standing alone, be not appealable, does it become so by the incorporation into it of a direction to the defendant, its officers, directors, agents and employés, to turn over and deliver to the receiver the property in their hands? These questions must be determined by a consideration of section 7 of the act of March 3, 1891, c. 826, creating Circuit Courts of Appeal, 26 Stat. 517, as amended February 18, 1895, c. 96, 28 Stat. 666. The section provides —

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued,

refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the Circuit Court of Appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further*, That the court below may in its discretion require, as a condition of the appeal, an additional injunction bond."

Under this section it has been decided that when an appeal is taken from an interlocutory order or decree granting or dissolving an injunction the whole of such interlocutory order or decree is before the Court of Appeals for review, and not simply that part which grants or dissolves the injunction, and that on the hearing in the Court of Appeals that court may consider and decide the case upon its merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518; *In re the Tampa Suburban Railroad Company*, *ante*, 583. But each of those cases proceeded upon the fact that there was a distinct order granting, continuing or dissolving an injunction. In the case at bar there is no such order. It is true, following the order of appointment, there is a direction to the defendant, its officers, directors and agents, to turn over to Campbell the property of which he is appointed receiver, but that is only incidental and ancillary to the receivership. This is obvious; for if the court subsequently entered an order, in terms setting aside only the appointment of the receiver, all the other parts of the original order would immediately and without specific mention disappear and cease to have any force. Indeed, the mere appointment of a receiver carries with it the duty on his part of taking possession, and the further duty of those in possession of yielding such possession. So that while as a part of an

order appointing a receiver there is something in the nature of a mandatory injunction, that is a command to the receiver to take and to the defendant to surrender possession, yet such command is not technically and strictly an order of injunction.

The last proviso in the section emphasizes this distinction: "The court below may in its discretion require, as a condition of the appeal, an additional injunction bond." The bond is described. It is not a bond to secure against injuries which may result if a receiver is wrongfully appointed or discharged, but is technically an injunction bond; that is, a bond to answer for damages in case of a wrongful order either granting, continuing or vacating an injunction. Receivership implies possession, and if no bond can be required to guard against loss from taking or surrendering possession it is difficult to perceive the significance of an additional injunction bond in a receivership case. The question is not, whether included in an order appointing a receiver, there may not be, either expressed or implied, some directions of a mandatory character, something in the nature of an injunction, but whether Congress in this legislation provided for appeals in cases other than those in which an injunction, technically speaking, is either the sole or a principal part of the order or decree. Orders granting injunctions and orders appointing receivers are, in the common understanding of the profession, entirely independent. The distinction between the two is clearly recognized in the text books and in the reports. We have separate treatises on injunctions and on receivers. The separation between them is one which runs through the law, and while it is true that the mandatory features which, either expressly or by implication, attend orders appointing receivers, are sometimes made the matter of discussion in treatises on receivers, or the subject of comment in decisions concerning receivers, yet the distinction is never forgotten. Familiar, as it must be assumed to have been, with this generally recognized distinction, Congress, if it had intended that appeals should be allowed from orders appointing receivers, as from orders in respect to injunctions, would doubtless have expressly named such orders. Its omission of the one and the men-

tion of the other is a clear declaration that only one should be the subject of appeal and the other not. And it would savor of judicial legislation to hold that, although Congress has not authorized appeals from orders appointing receivers, the mere fact that in such an order there is a direction of a mandatory character, either expressed or implied, in respect to taking possession, makes it appealable, as an order granting an injunction.

For these reasons we are of opinion that the question should be answered in the negative, and it will be so certified to the Court of Appeals.